No. 75-1679

In The

SUPREME COURT OF THE UNITED STATES

MAY TERM, 1976

PENA NENOFF, ANCILLARY ADMINISTRATRIX OF THE ESTATE OF NENO S. NENOFF, DECEASED,

Petitioner,

V.

GEORGE M. THOMPSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

John G. Rust
833 Security Bldg.
Toledo, Ohio 43604
(419) 243-9191

Attorney for Petitioner

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1. Petitioner prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Ohio, entered in the above-entitled case on February 20, 1976.

CITATIONS TO OPINIONS BELOW

The Supreme Court of Ohio did not render an opinion in this case, but merely issued two orders; one denying the appeal as of right from the Lucas County, Court of Appeals, holding that no substantial constitutional question existed, App. P. 1, and one denying a petitioner's motion to certify the record in this cause, App. P. 2. The opinions of the Lucas County Court of Appeals, one announced on June 20, 1975, App. P. 17, which was refiled and one entered along with its additional opinion on October 31, 1975, App. P. 25, are also unreported. Petitioners sued in two actions, which were consolidated over Petitioner's objection, the first, Common Pleas No. 203720 being for the wrongful death of her son, Neno S. Nenoff, for the benefit of herself, and also the surviving spouse and dependent children of decedent, and the second,

No. 206839, being the so called "Survivorship Action" for medical expenses, funeral expenses, and a prayer also for exemplory damages. The only opinion by the Trial Court was that overruling petitioner's motion for a new trial in these two causes, App. P. 34.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on February 20, 1976. The judgment is final, and is from the highest court of the state. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3), since petitioner claims rights, privileges, and immunities, under the Consitution and statutes of the United States, including the claim that the Ohio Guest Statute, Revised Code Section 4515.02 is unconstitutional.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Ohio Guest Statute, Ohio Revised Code Section 4515.02, in a state wrongful death action, and also a survivorship action, deny to the decedent's surviving mother, spouse, and minor children, each a direct beneficiary and a real party in interest in the wrongful death action, rights, privileges, and immunities, without due process of law, and equal protections of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States?

2. Does the U.S. Constitution through the Fourteenth Amendment require a state's appellate and highest Courts to apply to all then pending cases, a ruling in another case by the state's highest court that a state statute prescribing tort liability, to wit: The Guest Act, was unconstitutional for violation of the Fourteenth Amendment of the U.S. Constitution, and also for violation of the state's constitution, and therefore, of no legal effect nor force in either creating liabilities or granting rights, there being no compelling judicial considerations to the contrary, although the issue of unconstitutionality of the state statute was first raised in the appeal from the trial court to the intermediate appellate court?

3. Does the U.S. Constitution through the Fourteenth Amendment guarantee in a state action for the wrongful death of the plaintiffs' decedent the right to be present during all the trial to the surviving spouse and minor children who are the actual beneficiaries of, and the real parties in interest in, the action?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

UNITED STATES CONSTITUTION, AMENDMENT XIV

Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law shich shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO CONSTITUTION

Section 2, Article I of the Ohio Constitution reads:

> "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly."

Section 16, Article I of the Ohio Constitution reads:

> "All courts shall be open, and every person, for injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

OHIO REVISED CODE SECTION 4515.02, formerly General Code 6308-6, being the so called Ohio Guest Statute, reads:

> "The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest, resulting from the operation of said motor vehicle, while such guest is being transported without payment therefor in or upon said motor vehicle, unless such injuries or death are caused by the willful or wanton misconduct of such operator, owner, or person responsible for the operation of said motor vehicle."

LAW OF OHIO, Volume 115 Page 57. Ohio Revised Code, Section 2321.03, formerly General Code 11560, Exception not necessary:

> "An exception is not necessary, at any stage or step of the case or matter, to lay a foundation for review when ever a matter has been called to the attention of the court by objection, motion, or otherwise and the court has ruled thereon.

Error can be predicated upon erroneous statements contained in the charge, not induced by the complaining party, without exception being taken to the charge. Laws of Ohio, Vol. 116 at page 115.

STATEMENT OF THE CASE

A. PLEADINGS AND EVIDENCE

The pleadings and evidence established here that these actions stem from an uncalled for collision, when respondent Thompson drove his open Pontiac convertible, in Toledo, off an exit ramp of the Detroit-Toledo Expressway, at a speed said by a witness, of 55-60 mph or more, so fast that the witness knew defendant was 'going to get it", and not make the curve of the exit ramp. The car left the roadway, skidded, hit a ple, struck a fatal blow to decedent. The maximum safe speed of the curve was 35 mph, according to the evidence, and to attempt the curve at 55 mph or more, as respondent did, was obviously fool hardy and wanton misconduct.

Attorney Kelsey D. Bartlet filed a death action, and later Attorney John G. Rust was brought in as co-counsel, and both attorneys filed the "Survivorship" Action Petition. Mrs.

Pena Nenoff, mother of plaintiff's decedent resides in Toledo, and was the duly appointed Administratrix; Mrs. Pauline Nenoff is the surviving spouse of plaintiff's decedent and with their six minor children and decedent lived, and the survivors now continue to live in Flint, Michigan. The wrongful death action is also for the benefit of another daughter of the decedent, Nena Nenoff (Ladibon).

Before the start of the trial, plaintiff's counsel pleaded orally to the court a challenge to the array of jurors, and the Court at Transcript 2 stated that had such a motion of challenge been filed, he would have granted it, but plaintiffs did not file, in order to keep the trial date.

B. THE TRIAL COURT SPECIFICALLY HELD THAT PLAINTIFF COULD NOT RECOVER BY PROVING MERE NEGLIGENCE, BUT TO RECOVER, PLAINTIFF UNDER THE GUEST STATUTE HAD TO PROVE WANTON OR WILFUL MISCONDUCT.

In each petition, plaintiff alleged in part, "...that over the protest of plaintiff's decedent he (defendant) persisted in taking said decedent to do work for him to property that he owned or controlled..." Respondent Thompson was represented by lead counsel, Attorney James R. Jeffery.

Thus the Transcript at page 391 B shows defendant Thompson's Motion by Mr. Jeffery as follows:

> "Mr. Jeffery: I move also for directed verdict on the issue of liability in both cases. I will nake joint argument.
>
> "No. 203720, this case did not involve wilful and wanton misconduct. I move for a directed verdice on the issue of negligence, which is included in the petition in 203720 and 206839, because this is clearly a case of guest-passenger situation, and the evidence shows that the parties were on their way; that Neno Nenoff was the guest of George Thompson. Therefore, the test of liability is one of not negligence but wilful and wanton misconduct. So in both cases, 203720 and 206839, I move for a directed verdict concerning the issue of negligence; that it be omitted from this particular consideration.

"THE COURT: Well I a gree with that. Unfortunately in order to instruct on wilful and wanton, you have to define negligence. The Court will have to do the negligence--his failure to use ordinary care--and wilful and wanton is something more than that, but the issue ...See what they have to say."

Then at transcript: page 393:

"MR. BARTLETT: If reasonable minds could not differ at this point, Your Honor, about what is already in evidence, that might be applied then, yes. You could direct the verdict byt there is sufficient evidence in here now in both matters.

"In this matter here we have, first, George Thompson's statement that he took Neno Nenoff in a car over to show him, whereever the place was, and drove around and then back to Tony Packos.

"Now we have Mrs. Pena Nenoff's testimony to the fact that George Thompson was looking for Neno Nenoff the day before to get him to help with a boat, which Mr. Thompson himself has stated that Mr. Nenoff did work on. His statement, was, well he had a key to it so he could work on it too.

"THE COURT: The law is clear that before you can show that a man is a passenger for hire, to take him out of the wilful and wanton, you've got to show a prior agreement to travel for hire, which makes a driver a

> common carrier and removes the wilful and wanton. Now there is no evidence of a prior agreement between George Thompson and the decedent, or that he was the sole benefit of Mr. Thompson.
>
> "Therefore, as a matter of law I am going to rule this is strictly a guest case and the standard has to be wilful and wanton.

And then, at transcript 396:

> "MR. JEFFREY: I made a motion for directed verdict.
>
> "THE COURT: It has been granted to each as negligence. It is overruled as to liability or wilful and want questions." (Underscoring ours)

Petitioners here, plaintiffs below, did not "induce" the trial court to instruct that plaintiffs had to prove wanton misconduct to recover--petitioners were required to meet that standard, and merely did the best that they could under the circumstances. And as the Ohio Supreme Court, after these causes were appealed to the Lucas County Court of Appeals, declared the Ohio Guest Statute unconstitutional, in Primes v. Tyler, 43 O. St. 2d, 195 331 N. E. 2d 723 (1975), petitioners at the trial were required

to meet an unconstitutional standard. At the trial the jury found for the defendant-respondent here, the jury apparently finding that there was no "intent to injure," and further that the defendant was not conscious from his knowledge of such circumstances and conditions, that his conduct will probably result in injury."

The verdict of the jury was general. Respondent-defendant Thompson below argued that the Ohio Two Issue Rule applied, but the Court of Appeals, on Motion for Rehearing, rejected that defense. Petitioner-plaintiffs first raised the issue of the unconstitutionality of the Ohio Guest Statute, in the Assignment of Errors, in the Court of Appeals, being Assignment No. XI, App. P. 33 . As prior Ohio Appellate Court decisions had upheld the constitutionality of the Ohio Guest Statute, and there were no decisions at the time of the trial in May, 1970, questioning the constitutionality, respondent did not "waive"

its right to allege constitutionality, and petitioner here has raised the issue timely.

This point is discussed in detail later herein, at page 27, at seq.

C. THE TRIAL COURT INSTRUCTED THE JURY THAT ON THE PRIMARY ISSUE OF LIABILITY THAT IF THE JURY FOUND THE DEFENDANT MERELY GUILTY OF NEGLIGENCE, THAT THE JURY MUST FIND FOR THE DEFENDANT; THEREFORE, THE TWO ISSUE RULE DOES NOT APPLY, AND THE OHIO GUEST STATUTE CONTROLLED THE VERDICT.

The Trial Court ruled that the cases were controlled by the Guest Statute, and this was admitted by the Court of Appeals, in their June 20, 1975 decision, stating, "This case is controlled by R. C. 4515.02, sometimes known as theGuest Statute." App. P. 23. At the transcript page 577, the Trial Court stated "In this case if you find that the conduct of the defendant amounts to mere negligence, the Court instructs you that your verdict must be for the defendant." Respondent Thompson may contend here that since there was an issue

of Assumption of Risk under the evidence, that the jury properly could have found Assumption of Risk here, and therefore the error of unconstitutionality of the Guest Statute, was not decisive. Firstly, petitioners point out that in Bush Admin v. Hardy Transfer Co. 146 O. S. 657, the fourth paragraph of the syllabus, which in Ohio states the law of the case, reads as follows:

> "In an action based on negligence, the issue of contributory negligence does not arise unless the issue of negligence on the part of the defendant is first found adverse to the defendant; an error in the charge of the Court on the issue of negligence prejudicial to the plaintiff will invalidate a verdict for the defendant even though there was no error in the charge on the issue of contributory negligence."

Assumption of Risk like contributory negligence, is an affirmative defense with the burden of proof on the defendant. 39 O. Jur. 2d, Negligence, Par. 145, P. 725. In Croke v. Chesepeake and Ohio R. Co. 86 O. A. 483, the Lucas County Court of Appeals stated, at page 490, "If the two issues

constitute a primary and a secondary issue, the rule is applied only if the primary issue is properly submitted." In the instant Nenoff case, the primary issue was that of the error of the Trial Court instructing the jury that recovery could not be had for the plaintiffs on proof of mere negligence, but that the plaintiffs could only recover if they prove wanton or wilful misconduct, an unconstitutional standard. Secondly, petitioners demonstrated below that there was error in the instruction by the trial court., because the trial court refused to instruct though requested, that the decedent was entitled to an instruction that the decedent was presumed by the law to have "acted with ordinary care to protect and preserve his life." 16 O. Jur. 2d Rev. Death, par. 197, P. 480. Again, the Court of Appeals did not find that Assumption of Risk was a defense here, but rather, held that petitioners coulnd not take the benefit of the unconstitutionality of the Ohio Guest

Statute, because they had not timely raised the issue. In passing, it should be stated that the evidence showed that the Respondent-defendant Thompson did not show any reckless driving, as he had driven around downtown Toledo and, up to the point of the accident, his driving had been free from mishap or carelessness.

D. THE TRIAL COURT DID ORDER PAULINE NENOFF, DECEDENT'S WIFE, TO LEAVE DURING THE VOIRE DIRE, AND LIKEWISE ORDERED THE MINOR CHILDREN OUT DURING VOIRE DIRE, AND AT ALL TIMES THEREAFTER, BOTH PAULINE NENOFF AND THE MINOR CHILDREN WERE UNDER THE ORDER OF THE COURT TO REMAIN OUTSIDE UNDER COURT ORDER.

The Tr. at page 5 shows the above, and reads:

"THE COURT: Very well, Mr. Rust, you may continue your inquiry.

"(Voire Dire Examination continued.)

""(Thereupon, the wife and children of the decedent entered the courtroom.)

"MR. JEFFERY: Will you Approach the Bench?

"(Discussion at the Bench).

"MR. JEFFERY: I am, at this point, making a motion for seperation of witnesses on behalf of the defendant.

"THE COURT: Motion for seperation of witnesses has been made, and the court will grant it.

"All parties who expect to testify in this law suit, with the exception of the plaintiff, Pena Nenoff, and the Defendant, George M. Thompson, will have to remain outside the courtroom until they are called as witnesses.

"MR. RUST: How about Mrs. Pauline Nenoff? May she sit here during the voir dire?

"THE COURT: Is she going to be a witness?

"MR. RUST: She is going to be a witness.

"THE COURT: No, sir.

"MR. RUST: Under the ruling of the Judge you will have to wait outside there. So you will have to wait outside--whatever he says--and I will talk to you further.

"(Thereupon, voir dire examination continued.)"

Plaintiff's Counsel properly understood

the Trial Court as so ordering, and kept Pauline Nenoff and the minor children out except when testifying.

Thus the TR at page 373-60 reads as follows:

> "THE COURT: That is all Mrs. Nenoff, thank you. You may step down. Do you want the witnesses to remain in the courttoom or not?
>
> "MR. BARTLETT: The winess should remain out of the courtroom. We may need her for rebuttal purposes.

Once the matter was brought to the attention of the judge, and the Court ruled, counsel were bound to comply therewith. No exception or objection was necessary under then controlling RC 2321.03, as the cause was tried before the present Ohio Rule of Civil Procedure came into effect on July 1, 1970. This was a denial of the constitutional rights of Pauline Nenoff, and the minor children, as each was a real party in interest, and no one had more to lose from the death of their husband and father.

The exclusion of plaintiff Pauline Nenoff, and the six surviving minor children of plaintiff's decedent was urged as a ground for granting the motion for a new trial, under Item 5, and in particular, Item 5 (F) which reads, "In excluding Mrs. Pauline Nenoff from the right to sit in the Court Room during the proceedings, although shewas the surviving wife of the decedent;" In Plaintiff's Supplemental Memorandum by Attorney Rust in Support of Motion for New Trial, filed in the trial court on November 18, 1970, additional law was cited upon this point, including a citation to Burwell v. Maynard, 21 O. S. 2d 108, where paragraph 2 of the syllabus reads,

> "In an action for wrongful death, the personal representative is merely a nominal party and the statutory beneficiaries are the real parties in interest.

At page 7 of the said memorandum is the statement,

> "The general thrust is that if you are involved in a law suit, you have a basic, elementry, constitutional type of right to be present and look after your rights."

Reference was made to the case of Grant v. Paluch,

210 N. E. 2d 35, and at page 9, the said memorandum of law for the petitioner referred to the constitutional guarantees of due process of law guaranteeing the right of a party plaintiff to be present during the trial. Thus, the constitutional issue was raised at the trial court, and has been asserted in each court thereafter. Trial counsel, Mr. Jeffery, an able and respected attorney, clearly recognized the exclusion of Mrs. Pauline Nenoff, in his Memorandum, filed on June 26, 1970, at page 4 thereof, which reads in part as follows:

> "(F) Mrs. Pauline Nenoff was not a party in this action and was excluded from the court pursuant to defendant's motion for seperation of witnesses. Although Mrs. Nenoff might be the widow of the decedent, she is not a prty to the law suit. There was one plaintiff, Mrs. Pena Nenoff, the decedent's mother, and she sat in the court room during the entire proceeding."

E. PETITIONERS DID NOT INDUCE THE TRIAL COURT TO INSTRUCT THE JURY THAT PLAINTIFF COULD ONLY RECOVER IF WANTON OR WILFUL MISCONDUCT WERE PROVED.

Respondent will probably contend Petitioner "induced" the Trial Court to instruct that plaintiff could only recover if wanton or wilful misconduct were proved. In this Petition at page 10, we showed how the Trial Court acted in response to defendant's motion for a directed verdict, by ruling plaintiff had to prove wanton misconduct to recover.

Petitioner asked the Trial Court to give a lawful definition of wanton misconduct, to be used properly by the jury according to law in determining punitive damages, or for any proper purpose. Objection was duly made at the close of the instructions because the requested definition of wanton misconduct was not given, Transcript 595, and a Special Instruction on wanton misconduct was refused, as was referred to in the Motion for New Trial, and attached thereto.

Once the Trial Court ruled that petitioners could not recover on mere negligence, there was nothing else petitioner could do. Respondent made its own motion to do that--Petitioners didn't ask for that ruling nor induce it.

In Carrothers v. Hunter, 23 Ohio St. 2d 99 (1970), the Ohio Supreme Court stated, at page 103,

> "In the case at bar, nothing in the record indicates that the appellee's counsel in any manner persuaded or influenced the trial judge to give the erroneous charge to the jury. Under the instant circumstances, appelle's innocent acquiescence in the trial judge's erroneous conclusion that the applicable law was stated in the Kohn case does not establish that the charge was in any manner induced by the appellee."

We respectfully submit that a reading of any Ohio case will fairly show that Petitioners here did not "induce" any error, and that Petitioners are free to complain of the errors in the instructions, and the unconstitutional barriers to recovery.

REASONS FOR GRANTING THE WRIT AND ARGUMENT

I. THE OHIO GUEST STATUTE IS UNCONSTITUTIONAL AND VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

At the outset, we wish to point out that this Court could, and we say, should, remand this cause to the Ohio Supreme Court on the Authority of O'Connor v. Ohio, 385 U.S. 92, (1966), and Rosenblatt v. Baer, 383 U. S. 75 (1966), because the Petitioners Nenoff here raised the constitutionality issue as soon as reason for urging it arose, and it appeared not futile to do so, and the Lucas County Court of Appeals denied a new trial here on the federal constitutionally erroneous ground that the point was waived because not raised in the Trial Court, and secondly, that the Fourteenth Amendment protections must be applied to all pending cases, unless there are unusual and compelling considerations to the contrary, and in the instant case there are none, since Respondent properly

has no ground for asking that he be given an unconstitutional advantage over the Nenoffs, as in fact he has been up to now.

It is obvious, we submit, that this Court can here rule and spell out the protection of the Fourteenth Amendment, as it should be applied by the state highest courts when so applying it. This Court could leave the matter of the unconstitutionality of the Guest Statute there, and direct the state court to apply it fairly to all pending cases.

The Ohio Supreme Court in Nealy v. Wingard, App. P. 63, and the Lucas County Court of Appeals in Thompson v. Wilson , App. P. 69, each applied Primes v. Tyler, supra, although in neither case was the issue of unconstitutionality raised in the Trial Court, and in the Nealy v. Wingard case in the Ohio Supreme Court, it was never raised. The Nenoffs also deserve to have their rights determined only by constitutional standards.

But, if need there be, we respectfully request this Court to declare the Ohio Guest Statute unconstitutional.

The Ohio Supreme Court so held in Primes v. Tyler, 43 O. St. 2d 195, because it violates both the U.S. and Ohio Constitution, App. P. 14. The opinion is given in full in the Appendix at page 5, and thoroughly discusses the relevant cases and arguments, so that citation of additional argument or cases would seem not needed here, and now.

II A.

THE FOURTEENTH AMENDMENT OF THE U. S. CONSTITUION REQUIRES THAT A DECISION BY THE STATE'S HIGHEST COURT DECLARING A STATE STATUTE PRESCRIBING TORT LIABILITY, TO BE UNCONSTITUTIONAL FOR VIOLATION OF THE FOURTEENTH AMENDMENT OF THE U. S. CONSTITUTION, AND THEREFORE, OF NO FORCE AND EFFECT IN CREATING LIABILITIES OR RIGHTS, TO BE GIVEN EFFECT AND APPLIED BY ALL THE STATE'S COURTS, BOTH APPELLATE AND TRIAL, TO ALL PENDING CASES, ALTHOUGH THE LITIGANT FIRST RAISED THE CONSTITUTIONAL ISSUE IN THE INTERMEDIATE APPELLATE COURT.

First in relevance is the duty of this and all courts to protect and make effective a citizen's constitutional rights.

> "It is the duty of the Court always zealously to guard the constitutional right of citizens." 16 C. J. S. Constitutional Law, Par. 921 P. 298

Secondly, we know of no decision by this Court passing directly on whether a decision declaring a state statute prescribing tort liability to be unconstitutional for violation of the U. S. Fourteenth Amendment, shall be given so called prospective or retroactive application.

Nor has any decision been found whereby application was not given to all pending cases where a law, statute, or ordinance was declared to be unconstitutional.

We submit that the thrust and thread logically of the various decisions in both civil and criminal cases is to follow the classical common law rule of applying the decision to all pending cases wherein no final judgment has been rendered, and also in civil cases retroactively to prior cases unless manifest and marked injustice would follow, or there are "compelling judicial considerations" to the contrary.

Believed controlling in priciple is O'Connor v. Ohio, 385 U. S. 92, 87 S. Ct. 252 (1966), where the Ohio Supreme, on being ordered by this Court to reconsider their prior decision of affirmance, in the light of Griffin v. California, 380 U. S. 609, 85 S. Ct. 1229, 14 L Ed 2d 106, again affirmed, this

second affirmance being on the ground that defendant had not raised this constitutional point at his trial and during his first appeal in the state court, and so therefore, the Ohio Supreme Court refused to consider the Griffin issue. In a Per Curiam opinion, this Court held that the Griffin decision applied to O'Connor because O'Connor's case was still pending and that this right was constitutionally protected. The Per Curiam opinion reads in part as follows in 385 U. S. at page 92, 87 S. Ct. at page 253,

> 'The State does not contest the fact that the prosecutor's remarks violated the constitutional rule announced in Griffin. Moreover, it is clear the prospective application of that rule, announced in Tehan v. U.S. ex rel. Shott, 382 U. S. 406, 86 S. Ct. 459, 15 L Ed 2d 453, does not prevent petitioner from relying on Griffin, since his conviction was not final when the decision in Griffin was rendered. Indeed, in Tehan we cited our remand of petitioner's case as evidence that Griffin applied to all convictions which had not become final on the date of the Griffin Judgment.

382 U. S., at 409, n. 3, 86 S. Ct., at 461. Thus, the only issue now before us is the permissibility of invoking the Ohio procedural rule to defeat petitioner's meritorious federal claim."

"We hold that in these circumstances the failure to object in the state courts cannot bar the petitioner from asserting this federal right. Recognition of the States' reliance on former decisions of this Court which Griffin overruled was one of the principle grounds for the prospective application of the rule of that case. See Tehan v U. S. ex rel. Shott, 382 U. S. 406, 417, 86 S. Ct. 459, 465, 15 L Ed. 2d 453. Defendants can no more be charged with anticipating the Griffin decision than can the States. Petitioner had exhausted his appeals in the Ohio courts and was seeking direct review here when Griffin was handed down. Thus, his failure to object to a practice which Ohio had long allowed cannot strip him of his right to attack the practice following its invalidation by this Court."

"We therefore grant the petition for certiorari and reverse the judgment of the Supreme Court of Ohio."

"It is so ordered."

"Judgment reversed."

In the instant Nenoff case at bar, both the Bench and Bar of Ohio where this cause was

tried in Ohio in 1970, had long since accepted the Ohio Guest Statute as apart of the fixed law of Ohio. Even after the Summit County Court of Appeals, in Primes v. Tyler, 43 Ohio App. 2d 163, 337 N. E. 2d 173, on December 11, 1974 rendered an opinion declaring the Ohio Guest Statute unconstitutional, and before the Ohio Supreme Court rendered it's historic and unexpected decision, 43 O. S. 2d 195, 331 N. E. 2d 723, July 23, 1975, our Lucas County Court of Appeals on June 21, 1975 rejected Nenoff's attack on the constitutionality of the Guest Statute, adding support to the view of Ne n off's counsel that it would have been "Futile" to have asserted the constitutional issue any sooner than it was asserted in our Lucas County Court of Appeals. Counsel in fact did assert the constitutional attack on the Guest Statute just as soom as there appeared any reasonable hope of its being accepted.

The Guest Statute was upheld by the decision in Smith v. Williams, 51 Ohio App. 464, 1 N. E. 2d 643, (1935) and Rector v. Hyer, 35 Ohio Law Abs., 451, 41 N. E. 2d 886 (1941), in which the constitutionality was attacked, where the opinion in 35 Abs., at page 454 reads,

> "So far as we know or are advised, the constitutionality of this action has never been brought into question. We are unable to conclude that the constitution made at the present time is well grounded."

APPELLANTS NENOFFS' ATTACK ON THE CONSTITUTIONALITY OF THE GUEST STATUTE WAS TIMELY.

In addition to the foregoing cases, added forceful precedent is found in Rosenblatt v. Baer, 383 U. S. 75, 15 L Ed 2d 597, 86 S. Ct. 669 (1966), where the opinion of the Court, by Justice Brennan, on this point is clear and decision, where the new and change in the law occurred after trial, and reads as follows in 383 U. S. at page 77, 86 S. Ct. at page 671:

> "A jury in New Hampshire Superior Court awarded respondent damages in this civil libel action based on one of petitioner's columns in the Laconia Evening Citizen. Respondent alleged that the column contained defamatory falsehoods concerning his performance as Supervisor of the Belknap County Recreation Area, a facility owned and operated by Belknap County. In the interval between the trial and the decision of petitioner's appeal by the New Hampshire Supreme Court, we decided New York Times Co. v. Sullivan, 376 U. S. 254, 84 S. Ct. 710, 11 L Ed 686. We there held that consistent with the First and Fourteenth Amenments a State cannot

> award damages to a public official for defamatory falsehood relating to his official conduct unless the official proves actual malice-that the falsehood was published with knowledge of its falsity or with reckless disregard of whether it was true or false. The New Hampshire Supreme Court affirmed the award, finding New York Times no bar. 106 N. H. 26, 203 A. 2d 773. We granted certiorari and requested the parties to brief and argue, in addition to the questions presented in the petition for certiorari, the question whether respondent was a "public official" under New York Times and under our decision in Garrison v. State of Louisiana, 379 U. S. 64, 85 S. Ct. 209, 13 L Ed 2d 125; 380 U. S. 941, 85 S. Ct. 1023, 13 L Ed 2d 961."
> (Underscoring ours)

Also in Curtis Publishing Co. v. Butts, 388 U. S. 130, 18 L Ed 2d 1094, 87 S. Ct. 1975, (1967) this court refused to find waiver of constitutional attack, emphasizing that waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The opinion by Justice Harlan, reads in 388 U. S. at page 142, 18 L. Ed. 2d at page 1104,

> "Before we reach the constitutional arguments put forward by the respective petitioners, we must first determine whether Curtis has waived its right to assert such arguments by failing to assert them before trial. As our dispositions of Rosenblatt v. Baer, 383 US 75, 15 L ed 2d 597, 86 S Ct 669 and other cases involving constitutional questions indicate the mere failure to interpose such a defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground. Of course it is equally clear that even constitutional objections may be waived by a failure to raise them at a proper time, Michel v. Louisiana, supra, 350 US at 99, 100 L ed at 92, but an effective waiver must, as was said in Johnson v. Zerbst, 304 US 458, 464, 82 L ed 1461, 1466, 58 S Ct 1019, 146 ALR 357, be one of a "known right or privilege." (Underscoring ours)

That there was no waiver by Nenoff's counsel, is also borne out by the court's statment that it was not thought "unreasonable" for the lawyer, not to have raised the constitutional issue before this court's decision in New York Times. In summary, the opinion in 388 U. S. at page 145, 18 L. Ed. 2d at page 1105 reads as follows:

"We would not hold that Curtis waived a "known right" before it was aware of the New York Times decision."

Nenoff's counsel raised the constitutional issue as soon as an Ohio Court spoke, which was well after the trial; and the time of raising the issue has actually and practically made no difference.

II B.

THE QUESTION OF WHETHER A STATE DECISION BASED ON THE FOURTEENTH AMENDMENT DECLARING UNCONSTITUTIONAL A STATE STATUTE PRESCRIBING TORT LIABILITY SHALL BE APPLIED "PROSPECTIVELY" TO PENDING CASES, AND RETROACTIVELY TO PRIOR CASES IS A QUESTION GOVERNED BY THE U. S. CONSTITUTION.

THE CONTROLLING CONSIDERATIONS DECLARED BY LINKLETTER CALL FOR DECLARATION OF THIS RULE OF APPLICATION TO ALL PENDING CASES.

This court in O'Connor v. Ohio, 385 U. S. 92, rejected specifically a rule of procedure imposed by the Ohio Supreme Court that defendant would be deprived of his constitutional rights because defendant had not raised his constitutional claim at trial. The U. S. Constitution controls-and well it should, because a constitutional right taken away for any procedural reason is a constitutional right denied and is in practice non-existent. If the citizens are to enjoy the protection of the Constitution, such rights should as far as possible be shielded from procedural loss-because as certain as night and day, lawyers will make procedural mistakes,

and the citizens should not be penalized. In no era have the citizens truly wanted to glorify procedure-rather, they want their rights determined on the merits, and this desire and need commend themselves to the highest judicial traditions.

This court has given the protection of constitutionally guaranteed rights retroactively-to cases in which a "final judgment had long been rendered -

> Jackson v. Denno, 378 U.S. 368, 12L Ed 2d 908; Pickelsimer v. Wainwright, 372 U.S. 335, 11 L. ed. 2d 41; Doughty v. Maxwell, 376 U.S. 202, 11 L Ed 2d 650; Eckrdige v. Washington Prison Board, 357 U.S. 214, 2 L. ed. 2d 1269.

Before undertaking a discussion of the Linkletter criteria, we wish to question whether this Court has ever rendered any decision declaring a citizen entitled to certain constitutional rights in which the rule was not applied to pending cases. Likewise, we respectfully question whether there

are any decisions by this Court wherein this Court allowed a state court to define to what cases the rights guaranteed by the U. S. Constitution were to be applied. In short, we submit that the question of to what cases U. S. Constitutional rights are to be applied is solely a Federal question.

In Linkletter v. Walker, 381 U. S. 618, 14 l Ed 2d 601, (1965) Justice Clark declared the criteria for determining retroactivity on constitutional questions as follows in 381 U. S. at page 629, 14 L. Ed. 2d at page 608,

> "Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."

Justice Clark also stated the additional criterion in 381 U. S. 637, 14 L Ed 2d at page 613, as follows:

> "Finally, there are interests in the administration of justice and the integrity of the judicial process to consider. To make the rule of Mapp retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory will be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice." (Underscoring ours)

The Nenoffs to date have been denied a constitutionally fair and properly held trial. The trial judge administered the Ohio Guest Statute - but that imposed unconstitutional barriers to recovery. The unconstitutional effects prevented a fair trial, just as though in other cases a man was denied a fair trial because he had no lawyer. The results are determined by unconstitutional standards. The Nenoffs respectfully ask the aid of this Court for a trial according to law and to the U. S. and Ohio Constitution.

Respondent did not in any way rely on the Ohio Guest Statute in determining to drive at his uncalled for speed. We submit that there are no substantial factual and realistic arguments against applying the rule to all pending cases, nor even retroactively, as obviously has occurred in some of the prior cases.

II C.
FAILURE BY STATE COURTS TO APPLY A DECISION DECLARING A STATE STATUTE UNCONSTITUTIONAL FOR VIOLATION OF THE FOURTEENTH AMENDMENT, EQUALLY AND FAIRLY TO ALL PENDING CASES IS A VIOLATION OF A U. S. CONSTITUTIONAL RIGHT, AND AMOUNTS TO UNCONSTITUTIONAL ARBITRARY ACTION.

The Ohio Supreme Court in Nealy v. Wingard, App. P. 63, and the Lucas County Court of Appeals in Thompson v. Wilson, App. P. 69, applied Primes v. Tyler with its rule of the unconstitutionality of the Guest Statute, although in neither of the two cases had the attack on the constitutionality been raised any sooner then Petitioner did - which was in the Court of Appeals, and in the Nealy v. Wingard case the Ohio Supreme Court applied the rule although the issue of unconstitutionality was never raised. U.S. Constitutional rights will prosper or fade according to whether the U. S. Supreme Court monitors them effectively. Just look at the history of O'Connor v. Ohio, 385 U.S. 92, where twice defendant had to

get help from this Court.

Here, there are no classifications, nor no distinctions of substance. The "equal protection of the laws" arguments of Primes v. Tyler, 43 Ohio St. 195. (1975) apply.

The avoidance of all actions which are apparently or actually arbitrary, and lacking distinction in substance, creates disrespect for law. Why here should the Nenoffs be subjected to an unconstitutional standard, and this consideration applies regardless of whether the Ohio Guest Statute is unconstitutional because of the Ohio or the U.S. Constitution?

Petitioner's plea here is made and based in proper and high legal traditions.

III.

THE SURVIVING SPOUSE AND MINOR CHILDREN OF THE DECEDENT IN A WRONGFUL DEATH ACTION HAVE A RIGHT AS "REAL PARTIES IN INTEREST" TO BE PRESENT DURING ALL THE TRIAL OF THEIR ACTION, AND DENIAL THEREOF IS CONTRARY TO THE FOURTEENTH AMENDMENT,AND PREJUDICIAL ERROR.

Earlier at page 17 we showed how on defendant's motion Mrs. Pauline Nenoff, the surviving spouse, and minor children of decedent, were excluded from the Trial, during the taking of testimony, except when each was testifying. No one had more to lose from the death of her husband than Mrs. Pauline Nenoff.

Each was a "real party in interest" under Ohio Law, Burwell v. Maynard, 21 O.S. 2d 108.

Mrs. Pena Nenoff, the mother and administratrix, spoke such limited English she had to testify through an in terpreter. Mrs. Pauline Nenoff needed to be present during the selection of the jury, because it was well known she would be the target of severe cross-examination, and one cardinal rule of jury selection is one may well be

assured that if you have an aversion to a prospective juror, that the juror probably feels the same way. Mrs. Pauline Nenoff had twice sued her husband for divorce, but dropped the suits. She had no records of his support contributions. Decedent and she had not always filed income tax returns. Decedent was declared legally to be the father of an illegitimate child. Their marriage ties were under attack. Only Mrs. Pauline Nenoff knew or could effectively communicate with counsel, and particularly of the relationship between decedent, and defendant Thompson.

Experienced trial attorneys know some matter of vital importance will come up for the first time to the recollection of a party due to the turn of the evidence in the heat of trial, and especially in rebuttal. A party deserves to be present to observe and confront all witnesses, and to be observed by the jury, because her facial response may be helpful in convincing where the

truth lies, and to show one 's interest and fairness. Mrs. Pauline Nenoff and her children had a right to confront all witnesses, particularly where all of Respondent's witnesses were employees or past employees, except his former wife. The surviving spouse and minor children needed to be present to do all things a party may do in Court to help their cause. Their exlcusion was prejudicial. To exclude them in effect was to place them on a lower scale. It hurt.

THE ARGUMENT FROM U. S. SUPREME COURT DECISIONS

No direct holding on the precise or particular issue of whether a party, or a real party in interest, has a constitutionally guaranteed right to be present during all the trial of his or her case has been found. As the issue will doubtlessly arise again, not only in Ohio, but also in other states with similar rules of excluding witnesses and/or "parties" when not testifying, the instant case provides an excellent and needed opportunity for this Court to declare the proper constitutional rule.

The general injunction to the states to provide "fairness", the "opportunity to be heard", to confront adverse witnesses, and to do what a person properly does in the courtroom in defending or prosecuting his claims has been declared.

In Goldberg v. Kelly, 397 US 254, 25 L Ed 2d 287, the right of a welfare recipient to an evidentiary and personal hearing before termination of benefits was upheld. Justice Brennan's majority opinion, in part reads, in 397 US at page 267, 25 L Ed 2d at page 299,

> "We wish to add that we, no less than the dissenters, recognize the importance of not imposing upon the States or the Federal Government in this developing field of law any procedural requirements beyond those demanded by rudimentary due process.
>
> The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 US 385, 394, 58 L Ed 1363, 1369, 34 S Ct 779 (1914). The hearing must be 'at a meaningful time and in a meaningful manner." Armstong v. Manzo, 380 US 545, 552, 14 L Ed 2d 62, 66, 85 S Ct 1187 (1965). In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." (Underscoring Ours)

Further, Justice Brennan's majority opinion, also stated in emphasizing the right to confront witnesses, in 397 US at page 269, 25 L Ed 2d at page 300, as follows:

> "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. E. g., ICC v. Louisville & N. R. Co. 227 US 88, 93-94, 57 L Ed 431, 434, 33 S Ct 185 (1913); Willner v. Committee on Character & Fitness, 373 US 96, 103-104, 10 L Ed 2d 224, 229, 230, 83 S Ct 1175, 2 ALR3d 1254 (1963). What we said in Greene v. McElroy, 360 US 474, 496-497, 3 L Ed 2d 1377, 1390, 1391, 79 S Ct 1400 (1959), is particularly pertinent here:
>
> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudices, or jealousy."

> We have formalized these protections in in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment. . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases. . . but also in all types of cases where administrative. . . actions were under scrutiny."
>
> "Welfare recipients must therefore be given an opportunity to confront and cross-examine the winesses relied on by the department."
>
> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel," Powell v. Alabama, 287 US 45, 68-69, 77 L Ed 158, 170, 54 S Ct 55 (1932)."

Due process also embodies the right in civil proceedings to confront those testifying - - for the reasons that confrontations are necessary to help in eliciting true and reliable testimony, and also that the trier of facts may see the litigant's response and reaction, as a help to the trier of facts in properly evaluating the overall situation. This ess ential part of Due Process received emphasis

in Willner v. Committee on Character and Fitness, 373 US 96, 83 S Ct 1175 (1963), where this Court held that Willner, as an applicant for admission to the New York Bar, was entitled by the 14th Amendment to a hearing where he could confront those accusing him of wrongful conduct. Since Mrs. Pauline Nen off, a "real party in interest" under Ohio law as the surviving spouse, was denied the right of confrontation of those opposing and, for some of the witnesses, attacking her, important rights guaranteed by the U. S. Constitution were denied her.' Thus in Willner v. Committee on Character and Fitness, the opinion by Justice Douglas in 373 at page 103, 83 S Ct at page 1180, reads in part as follows:

> "We have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood. See Greene v McElroy, 360 US 474, 492, 496-497, 79 S Ct 1400, 1411, 1412, 3 L Ed 2d 1377, and cases cited. That

> view has been taken by several state courts when it comes to procedural due process and the admission to practice law. Coleman v. Watts, Fla., 81 So. 2d 650; Application of Burke, 87 Ariz. 336, 351 P. 2d 169; In re Crum, 103 Or. 296, 204 P. 948; Moity v. Louisiana State Bar Ass'n, 239 La. 1081, 121 So. 2d 87. Cf. Brooks v. Laws, 92 U. S. App. D.C. 367, 208 F. 2d 18, 33 (concurring opinion). We think the need for confrontation is a necessary conclusion from the requirements of procedural due process in a situation such as this. Cf. Greene v. McElroy, supra; Cafeteris and Restaurant Workers Union, Local 473, v. McElroy, 367 U. S. 886, 81 S Ct 1743, 6 L Ed 2d 1230."

Also, in concurring, Justice Stewart emphasized the importance of a litigant being able to confront those criticizing him, when in his concurring opinion he strongly made the point of confrontation, which surely applies to surviving spouse Mrs. Pauline Nenoff, when he stated in 373 US at page 108, 83 S Ct 1182, in part as follows:

> "Of course, if the denial depends upon information supplied by a particular person whose reliability or veracity is brought into question by the applicant, confrontation and the right of a cross-examination should be afforded."

Due process guarantees a full measure of justice, a full "day in court", not a denial of important rights, and each person is entitled to the same full measure. The dignity of the law and the mandate of the Constitution forbid that Mrs. Nenoff, the surviving spouse who actually had the most to lose from her husband's untimely passing, be denied the right to confront those criticizing her, and the right fully to counsel with and aid her attorneys in the heat of the trial. In 16 Amer. Jur. 2d, Constitutional Law, the text reads as follows at page 975:

> 'The proceeding or hearing requisite to due process must be appropriate, fair, adequate, and such as in practicable and reasonable in the particular case. It must be an orderly proceding, adapted to the nature of the case, in which the person to be affected has an opportunity to defend, enforce, and protect his rights."

THE ARGUMENT FROM DECISIONS FROM STATE AND OTHER APPELLATE COURTS

BY WELL REASONED DECISIONS, STATE COURTS HAVE ENFORCED THE CONSTITUTIONAL RIGHT OF A PARTY TO BE PRESENT DURING ALL THE PROCEEDINGS.

In Florence v. Wm. Moors Concrete Products, Inc., 35 Mich. App. 613, 103 N.W. 2d 72, (1971), the jury in the wrongful death actions, requested the instructions, which were long and complex, to be reread. Before doing so, the Court instructed the two surviving spouses, plaintiffs Bessie Florence and Alice Spencer, to leave the Court Room. The Appellate Court obviously considered the right to be both constitutionally guaranteed and highly significant and important. In 193 N.W. 2d, the opinion reads in part as follows:

> "Plaintiffs maintain they have an absolute right to be present at all stages of the proceedings regardless of whether criminal or civil in nature. We agree with this contention.

"The Michigan Supreme Court has clearly declared that a party cannot be excluded from the courtroom during proceedings in open court. In support of this proposition we cite the following from McIntosh v. McIntosh (1890), 79 Mich. 198, 203, 44 N. W. 592, 594:

"It is a matter generally within the discretion of the court to exclude witnesses; but, when such discretion is exercised, it should not be in a manner prejudicial to either side of the controversy, and all witnesses should be excluded who are to be called to that point, whethery they are witnesses of plaintiff or defendant. There is no rule, however, by which the court is authorized to exclude a party to the controversy."

"In the case of Fillippon v. Albion Vein Slate Co. (1919), 250 U.S. 76, 81, 39 S. Ct. 435, 436, 63 L. Ed. 853, 855-856 the Court stated:

"We entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict.

"In this case the trial court erred

in giving a supplementary instruction to the jury in the absence of the parties and without affording them an opportunity either to be present or to make timely objection to the instruction."

"The argument of defense counsel that excusal of the plaintiffs from the courtroom was harmless because no prejudice can be shown is unacceptable. Defense counsel is not in a position to know whether in fact any prejudice resulted.

"We conclude that reversible error was committed by the trial judge in requiring the plaintiffs to leave the courtroom during the rereading of the instructions to the jury."
(underscoring ours)

In Grant v. Paluch, 6 Ill. App. 2d. 247, 210 N.E. 2d 35, (1965) the Appellate Court of Illinois, First District, in a Dram Shop action against tavern owners for selling liquor to the plaintiff which proximately contributed to causing his injuries, ordered a new trial where the wife, who was held to be the real party in interest, was excluded. While the decision may rest on the Illinois Constitution,

the language seems directed toward expressing what the Court feels is a part of Due Process under any Constitution. The wife, the real party in interest, was excluded along with other witnesses, just as occurred in the instant Nenoff case. The Court ruled that in taking all the errors together committed by the Trial Court that a new trial was required. In 210 N. E. 2d at page 40, the Court stated as follows:

> "In Kopplin v. Kopplin, 330 Ill. App. 211, 71 N. E. 2d 180, the defendant interrupted the testimony of a witness and the trial court ordered her excluded from the court room until such time as she would be required to testify. In that case the Appellate Court stated that the exclusion of a party from the court room during a trial would be repugnant to constitutional provisions. In Gross v. Johnson, 248 Ill. App. 531, the court held that it was a denial of the defendant's constitutional right for the trial judge to deprive him of his legal privilege to be present during the whole of the trial. Such ex-

clusion would be a denial of due process. In In re Estate of Hoffman, 49 Ill. App. 2d 436, 200 N.E. 2d 37, the court said:

"The constitutional guaranty of due process of law in its procedural aspect, requires that every man shall have the protection of his day in court and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

"In the instant case that defendants argue that the court, by suggesting that the plaintiff should put Mrs. Grant on the stand first had obviated any error in excluding her from the court room. That argument is not tenable inasmuch as Mrs. Grant, the real party interest, had a right to be present in the court during the entire trial. In such exclusionary order the trial court erred."
(underscoring ours)

In Leonards of Plainfield v. Dybas, 130 N.J. L. 135, 31 Atl. 2d 496 (1943), the trial court's giving an answer to the jury's request for further instructions in the absence of counsel

and parties was held reversible error, as a denial of due process. In 31 Atl. 2d at page 497, the Court stated as follows:

> "The right of the parties to the cause to be present in person and by counsel at all stages of the trial, except the deliberations of the jury, is basic to due process. Cook v. Green, supra; Fillippon v. Albion Vein Slate Co. 250 U.S. 76, 39 St. Ct. 435, 63 L. Ed. 853; Wheeler v. Sweet, 137 N.Y. 435, 33 N.E. 483."
> (underscoring ours)

Fillippon v. Albion Vein Slate Co., cited in the above quotation, likewise had answered an inquiry from the jury for further instructions while counsel and the parties were absent. Although the facts are substantially different from the instant Nenoff case, the language of the Court treats the right of the party to be present as basic to due process.

VARIOUS STATE COURTS HAVE HELD A PARTY HAS A RIGHT TO BE PRESENT DURING ALL THE TRIAL. ALTHOUGH THE COURTS IN THESE CASES HAVE NOT REFERRED SPECIFICALLY TO CONSTITUTIONAL GROUNDS, IT IS ARGUEABLE THAT THE SAME WERE INTENDED BECAUSE THE COURTS VIEWED THE RIGHT AS BASIC AND ESSENTIAL TO DUE PROCESS.

In Martin v. Burcham, 203 S. W. 2d 807, the Texas Court of Appeal held that reversible error was committed in excluding the wife of the defendant who, under Texas community property laws, was a real party in interest. Likewise, in Sanders v. Lowrimore, 73 S. W. 2d 148, the Texas Court of Appeals affirmed that the plaintiff, as a real party in interest, had a right just as any other party, to be present. In Gotterdam v. Department of Labor and Industries, 185 W. 628, 56 Pac. 2d 693 (1936) the Washington Supreme Court upheld the right of the widow and children to be present, saying the widow was a party "and her children were interested".

In Jaffer v. Lilienthal, 101 Cal. 175, 35 Pac. 636 (1894), the court reversed because the court denied a continuance although the plaintiff was ill. In 35 Pac. at page 637, the opinion reads,

> "With all the care that can reasonably be taken by both attorney and client, some matter of vital importance is liable to be overlooked by them until the trial calls it to the recollection of the plaintiff, and this is especially true in relation to matters purely in rebuttal. It is the right of parties to be present at the trial of their cases." (Underscoring ours)

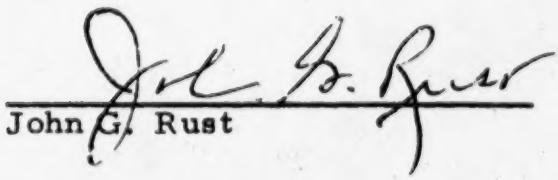
CONCLUSION

From the foregoing we submit that it may be fairly said that significant constitutional rights have been denied the Nenoffs. As sometimes occurs, errors of law have occurred, and fairly counsel for the Nenoffs did not anticipate all the points deemed important by the Court involved. Hopefully this Petition covers all relevant points.

The constitutional interpretation requested here are needed by both the Nenoffs and our Country. Judicial decisions and rules should be applied fairly and equally, and the Nenoffs should not have their claims tested by an unconstitutional statute, and they deserve a new trial, just at the Ohio Supreme Court in at least one case, and the Lucas County Court of Appeals ruled in another case. A distinction without a difference does not give our court system the

regard it should. Respondent Thompson alone caused an uncalled for passing; Petitioners deserve to have their claims judged on constitutional grounds, and not by an unconstitutional statute. Our State Courts do need effective direction and clarification from this great Court, so our great Constitution may be meaningfully carried out.

Respectfully submitted,



John G. Rust

APPENDIX

THE SUPREME COURT OF OHIO

THE STATE OF OHIO	)	1976 TERM
	)	
City of Columbus	)	To-wit: February 20, 1976

Pena Nenoff, Ancillary Admrx.,
Appellant,

vs.	)	No. 75-1203
	)	
George M. Thompson,	)	APPEAL FROM THE COURT OF
Appellee.	)	APPEALS
	)	for Lucas County

This cause, here on appeal as of right from the Court of Appeals for Lucas County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Lucas County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and seal of the Court this 3rd day of March, 1976.

/s/ Thomas L. Startzman, Clerk
/s/ Sam F. Green, Deputy

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO	)	1976 TERM
	)	
City of Columbus	)	To-wit: February 20, 1976

Pena Nenoff, Ancillary Admrx.,
Appellant,

vs.	)	No. 75-1203
	)	
George M. Thompson,	)	MOTION FOR AN ORDER DIRECTING
Appellee.	)	THE COURT OF APPEALS
	)	For Lucas County
	)	
		TO CERTIFY ITS RECORD

It is ordered by the Court that this Motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Mancino & Mancino.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and seal of the Court this 3rd day of March, 1976.

/s/ Thomas L. Startzman, Clerk
/s/_____, Deputy

THE STATE OF OHIO, LUCAS COUNTY, ss

I, CAROL A PIETRYKOWSKI, Clerk of Common Pleas Court and Court of Appeals, within and for said County, and in whose custody the FILES, JOURNALS and RECORDS of said Courts are required by the laws of the State of Ohio to be kept, hereby certify that the foregoing is truly taken and correctly copied from the Journal of the proceedings of said Court within and for said County, that said foregoing copy has been compared by me with the original entry on said Journal and that the same is a full and complete transcript thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name officially, and affixed the seal of said Court at the Court House in Toledo, Ohio, in said County, this 11th day of May, A.D., 1976.

SEAL

CAROL A. PIETRYKOWSKI, Clerk

By /s/ Paul E. Coon
Deputy

IN THE COURT OF APPEALS LUCAS COUNTY,
OHIO
SIXTH DISTRICT

PENA NENOFF, Ancillary Administratrix of the Estate of Neno S. Nenoff, Deceased.	)	C.A. No. 7840 C.P. No. 203720 C.P. No. 206839
Plaintiff-Appellant	)	NOTICE OF APPEAL TO OHIO SUPREME COURT
vs.	)	
GEORGE THOMPSON	)	John G. Rust Attorney for Plaintiff-Appellant
Defendant-Appellee	)	833 Security Bldg. Toledo, Ohio 43604
Filed: Nov. 28, 1975	)	Phone: 243-9191

Now comes Pena Nenoff, Ancillary Administratrix of the Estate of Neno S. Nenoff, Deceased, plaintiff-appellant herein, through her attorney, and does respectfully give and file herein her Notice of Appeal to the Ohio Supreme Court, from the judgment entered by this Court, on October 31, 1975, which had dismissed appellant's appeal.

This case and appeal involved substantial constitutional questions.

/s/ John G. Rust
John G. Rust
Attorney for Plaintiff-Appellant

Acknowledgment of service of copy of Notice of Appeal.

Receipt of a file copy of this Notice of Appeal is hereby recognized by James R. Jeffery, 935 National Bank Bldg., Toledo, Ohio 43604, attorney for Defendant-Appellee.

/s/ James R. Jeffery

Statement of the Case.

PRIMES, APPELLEE, *v.* TYLER, APPELLANT.

[Cite as Primes v. Tyler (1975), 43 Ohio St. 2d 195.]

Motor vehicles—Guest statute—R. C. 4515.02 unconstitutional—Equal protection—Section 2, Article I, Constitution—Due course of law—Article XIV, Amendments, U. S. Constitution.

R. C. 4515.02, the Ohio guest statute, is unconstitutional.

(No. 75-61—Decided July 23, 1975.)

CERTIFIED by the Court of Appeals for Summit County.

Plaintiff George Primes III, appellee herein, and defendant Donald G. Tyler, appellant herein, are part of a group of weekend golfers who travel to various golf courses by way of an informal car pooling arrangement, where the golfer who arranges the tee times with the golf course also arranges who should drive as he contacts the other riders. That determination (who drives) depends on the proximity of the selected golf course to the homes of the riders.

No payment has ever been made nor has any gasoline ever been purchased by anyone for the driver. No set arrangements regarding transportation have ever been worked out on a regular or definite basis.

On the day of the collision, May 29, 1972, Tyler picked up Primes at his home, and, en route to the golf course, failed to complete a turn at an intersection, and collided with a telephone pole, causing injury to Primes.

Primes filed a complaint in the Court of Common Pleas, which alleged that he was a "paying passenger" and that Tyler was guilty of ordinary negligence. Tyler's answer denied both allegations.

At the conclusion of the plaintiff's case, the court sustained defendant's motion for a directed verdict, and entered judgment for defendant.

Opinion, per W. BROWN, J.

Upon appeal, that judgment was reversed by the Court of Appeals for Summit County (Judges Victor, Mahoney and Doyle), which found that the evidence would not support a finding that plaintiff was a "paying passenger" and thus the Ohio guest statute, R. C. 4515.02, would apply to preclude liability, but that such statute is unconstitutional as violative of the equal protection guarantees of the Ohio and United States Constitutions. The Court of Appeals certified its judgment to this court.

Messrs. Cherpas, Manos & Syracopoulos, Mr. Christopher T. Cherpas, Messrs. Spangenberg, Shibley, Traci, Lancione & Markus and *Mr. Donald P. Traci*, for appellee.

Messrs. Knowlton, Sanderson, Ragan, Cady, Corbett & Drexler and *Mr. William J. Cady*, for appellant.

WILLIAM B. BROWN, J. R. C. 4515.02, the Ohio guest statute, reads:

"The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest, resulting from the operation of said motor vehicle, while such guest is being transported without payment therefor in or upon said motor vehicle, unless such injuries or death are caused by the willful or wanton misconduct of such operator, owner, or person responsible for the operation of said motor vehicle."

Upon this record, we agree with the determination of the Court of Appeals that plaintiff was a guest transported without payment, and not a "passenger." Plaintiff's allegation of negligence, rather than willful and wanton misconduct, on the part of defendant, squarely places defendant within the class of persons which the guest statute absolves of liability. Plaintiff may not recover for his injuries unless that statute contravenes the organic law of this state or nation. If the guest statute is unconstitutional, it "* * * is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal

contemplation, as inoperative as though it had never been passed." *Norton* v. *Shelby County* (1886), 118 U. S. 425, 442. Therefore, the question presented is whether the guest statute contravenes the constitutions of Ohio or of the United States.[1]

The guest statute finds its provenance in Connecticut where it was introduced in 1927, upheld by that state's Supreme Court in *Silver* v. *Silver* (1928), 108 Conn. 371, 143 A. 240, affirmed, 280 U. S. 117, and promulgated in Ohio as G. C. 6308-6 (115 Ohio Laws 57) on June 15, 1933. The statute's twofold objective has been described as to preserve the hospitality of the host-driver[2] and to prevent the possibility of fraudulent, collusive lawsuits against insurance companies.[3]

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[1]Text of pertinent constitutional provisions.

Section 2, Article I of the Ohio Constitution reads:

"All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly."

Section 16, Article I of the Ohio Constitution reads:

"All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

The Fourteenth Amendment to the United States Constitution reads:

"All persons born or naturalized in the United States, and subject to the jursdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[2]*Stiltner* v. *Bahner* (1967), 10 Ohio St. 2d 216, 222 ("The purpose of the guest statute is to protect the driver of the vehicle from being sued for injury by a rider upon whom he is intending to confer a benefit without payment therefor at the time of the claimed injury.").

[3]*Thomas* v. *Herron* (1969), 20 Ohio St. 2d 62, 66 ("* * * [T]he underlying purpose of the guest statute * * * is to prevent the pos-

Opinion, per W. BROWN, J.

Although this court "* * * need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation" (*Weinberger* v. *Wiesenfeld* [1975], U. S. , 43 L. Ed. 2d 514, 525, at fn. 16), we consider only the foregoing dual legislative purposes and proceed to "* * * the determination of whether there is some ground of difference having a fair and substantial relation to at least one of the stated purposes justifying the different treatment accorded * * *" (*Johnson* v. *Robison* [1974], 415 U. S. 361, 376) automobile passengers who pay the driver, and those passengers who do not.

Since "[t]he guest statute is intended to shield from liability" a certain "category of persons" (*Thomas* v. *Herron* [1969], 20 Ohio St. 2d 62, 64), we look first at the category thus established and its compatibility with equal protection guarantees.

"* * * We do not inquire whether this statute is wise or desirable * * *. Misguided laws may nonetheless be constitutional." *James* v. *Strange* (1972), 407 U. S. 128, 133. However, "* * * the mere recitation of a benign * * * [statutory] purpose is not an automatic shield which protects against any inquiry into the *actual* purposes underlying a statutory scheme." (Emphasis added.) *Weinberger* v. *Wiesenfeld, supra* (43 L. Ed. 2d 514), at page 525.

Under "traditional" equal protection analysis, it was required that a statutory classification be "shown to be necessary to promote a *compelling* governmental interest" (*Shapiro* v. *Thompson* [1969], 394 U. S. 618, 634) when it violated a "fundamental" interest (*Belle Terre* v. *Boraas* [1974], 416 U. S. 1, 7), or was based upon a trait which rendered it "suspect" (*San Antonio Independent School*

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sibility of fraud and collusion between social friends and family members to recover from the driver's insurance carrier."); *Kitchens* v. *Duffield* (1948), 149 Ohio St. 500, 503; Prosser, The Law of Torts (4 Ed.) 187, Section 34; White, The Liability of an Automobile Driver to a Non-Paying Passenger, 20 Virginia L. Rev. 326, 332-33.

Dist. v. *Rodriguez* [1973], 411 U. S. 1, 61, Justice Stewart, concurring). Otherwise, the classification would be upheld if there existed any conceivable set of facts under which the classification rationally furthered a legitimate legislative objective. *McGowan* v. *Maryland* (1961), 366 U. S. 420, 425.

However, "[i]n all equal protection cases * * * the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." *Police Dept. of Chicago* v. *Mosley* (1972), 408 U. S. 92, 95.

Recognizing that the arbitrary imposition of disabilities "'* * * is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing'" (*Jimenez* v. *Weinberger* [1974], 417 U. S. 628, 632), Chief Justice Burger states that "'* * * the equal protection clause does enable us to strike down discriminatory laws * * * where . . . the classification is justified by no legitimate state interest, compelling or otherwise.' [*Weber* v. *Aetna Casualty & Surety Co.* (1972),] 406 U. S. [164], at 175-176." *Ibid.*

Jimenez involved a statutory disparity in eligibility for social security benefits between two classes of illegitimate children. The government argued that to grant "eligibility for such benefits to * * * [the statutorily excluded class of] illegitimates would open the door to *spurious claims*," *i. e., fraudulent* or *collusive* claims. (Emphasis added.) *Ibid*, at page 634. The government urged that an "absolute bar to disability benefits is necessary to prevent spurious claims because '[t]o the unscrupulous person, all that prevents him from realizing . . . gain is the mere formality of a spurious acknowledgment of paternity or a collusive paternity suit with the mother of an illegitimate child who is herself desirous or in need of the additional cash.'" *Ibid*, at page 635.

The Chief Justice answered that contention as follows:

"We recognize that the prevention of spurious claims

is a legitimate governmental interest * * *. It does not follow, however, that the blanket and conclusive exclusion of appellants' subclass of illegitimates is reasonably related to the prevention of spurious claims. * * * [T]he potential for spurious claims is exactly the same as to both subclasses. * * * Thus, for all that is shown in this record, the two subclasses of illegitimates stand on equal footing, and the potential for spurious claims is the same as to both; hence to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws * * *." *Ibid*, at pages 636-637.

The concepts of *Jimenez* are transferable to the present matter. Prior to the enactment of the guest statute, paying passengers and nonpaying guests could recover for injuries negligently inflicted by their driver.[1] Under the statute, however, a paying passenger may still recover against a driver for ordinary negligence, but a nonpaying guest is wholly precluded from such recovery. The guest is denied all opportunity to disprove that any suit filed by him would be fraudulent, collusive or destructive of hospitality. On the other hand, the statute does nothing to prevent, but perhaps encourages, a guest to present a fraudulent claim that he paid for the ride or that the driver was guilty of willful and wanton misconduct, and prove such claim with perjury and the collusive assistance of the driver.

The North Dakota Supreme Court, in *Johnson* v. *Hassett* (1974), 217 N. W. 2d 771, 778, debunks the asserted statutory objective of preventing fraudulent and collusive suits in guest statute situations, as follows:

"* * * '[A] guest statute is no final answer to collu-

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[1]A guest statute is in derogation of the common law (*Botto* v. *Fischesser* [1963], 174 Ohio St. 322, 325), and in the absence thereof a driver "* * * must use reasonable and ordinary care for the safety of a guest * * * and is liable for injuries proximately caused by negligence in the handling of the vehicle." *Clinger* v. *Duncan* (1957), 166 Ohio St. 216, 219.

sion. It is still possible for the dishonest to fabricate evidence to support the higher degree of fault required by the statute. 2 Harper & James Torts 961, 1956.' As one example, it would be simple for a colluding host and guest to assert that payment had been made for the transportation, or that the driver was intoxicated, thereby withdrawing the case from the guest statute. In all other cases, we rely upon the standard remedies of perjury, the efficacy of cross-examination, the availability of pretrial discovery, and the good sense of juries to detect false testimony if it should occur. We do not withdraw the remedy from all injured persons in order to avoid a rare recovery based upon false testimony."

In short, the prevention of spurious claims is not "suitably furthered" (*Police Dept. of Chicago* v. *Mosley, supra*) by the guest statute nor by the differential treatment afforded therein to guests and passengers.

The other asserted statutory objective of the guest statute is the promotion or preservation of hospitality.* Of course it offends any sense of fairness to contemplate a hitchhiker fleecing his gracious host in a negligence action. However, the category of nonpaying guests includes more than hitchhikers, but gathers in its swath young children or aged relatives who rely upon a ride to the doctor's office. A driver would obviously foster a greater sense of hospitality to a friend or relative "guest" than to someone from whom he collects a transportation fee.

The Supreme Court of Kansas, in *Henry* v. *Bauder* (1974), 213 Kan. 751, 760, 518 P. 2d 362, rejected a similar thesis that an ungrateful guest should not be rewarded in a lawsuit against his host, on the ground that "* * * li-

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*Notions of hospitality underlie R. C. 2305.23, the Ohio good samaritan law. That statute singles out a group of benevolently-disposed individuals for immunity from negligent injury to persons while rendering medical treatment during the exigencies of an emergency. However, the favored treatment accorded such "good samaritans" would appear to further a legitimate legislative objective of providing emergency medical assistance to injured persons where delay might result in death or great bodily injury.

ability insurance has largely eliminated any notion of 'ingratitude.'" We recognize, as do the promoters of the anti-fraud and collusion rationale, that liability insurance is available to most drivers.

It was chiefly recognition of the widespread availability of liability insurance which led this court to abrogate the doctrine of charitable immunity in *Avellone* v. *St. John's Hospital* (1956), 165 Ohio St. 467.

Similarly, such recognition in this case shows that a statutory objective of preventing ingratitude is no longer viable in the context of differential treatment afforded by the guest statute.

Just as the guest statute does not suitably further the governmental interest to preventing collusive lawsuits, the differenial treatment afforded therein to guests and passengers cannot be justified by an alleged interest in fostering the amorphic concept of hospitality. It has not been suggested herein that a driver would consider it an affront to hospitality, if his injured guest were to be compensated by the driver's insurer.

We find further that the guest statute imposes, in effect, an "irrebuttable presumption" that a lawsuit filed by any nonpaying guest is fraudulent or collusive or lowers the quantum of hospitality in this state, when that presumption is not necessarily or universally true in fact. In *Vlandis* v. *Kline* (1973), 412 U. S. 441, a similar irrebuttable presumption was imposed against Connecticut college students who, after entering college as "non-residents," were presumed to remain non-residents while enrolled. In fact, many students became Connecticut residents while students, but the statute precluded a change in status. One of three reasons proffered by the state to justify the presumption was fraud prevention: "* * * Without the collusive presumption it would be almost impossible to prevent out-of-state students from claiming a Connecticut residence merely to obtain the lower [tuition] rates." *Ibid*, at 451. The court struck down the presumption as an obvious denial of due process.

We find that the compelling logic of *Vlandis* v. *Kline* applies with equal force to this case. The guest statute conclusively precludes a "remedy by due course of law" (Section 2, Article I of the Ohio Constitution) to injured persons even though evils statutorily assumed to exist may not obtain.

The Utah Supreme Court, in *Cannon* v. *Oviatt* (Utah 1974), 520 P. 2d 883, recently upheld its guest statute because the blueprint for dismantling the statute, *Brown* v. *Merlo* (1973), 8 Cal. 3d 855, 506 P. 2d 212, was not transposable upon the law of Utah, but was fatally intertwined with a legal system indigenous to California.

In words equally applicable to this case and this state, the Utah court noted (520 P. 2d, at 886):

"*Brown* v. *Merlo* is a logical consequence in that jurisdiction stemming from their prior determination to abandon the traditional tort doctrine that the status of a person determined the duty owed to him. In this jurisdiction the distinction between 'invitees' or 'business visitors' and 'licensees' or 'social guests' has been preserved. * * * Likewise, the distinction between a paying passenger and an automobile guest has been retained in the correlative distinctions between an invitee and licensee.

"* * * [T]he court in *Brown* v. *Merlo* relied extensively on *Rowland* v. *Christian* [(1968), 69 Cal. 2d 108, 443 P. 2d 561, which nullified the "traditional distinction between invitees and licensees"] to prove the invalidity of the hospitality justification for the guest statute."

Other states which have recently judicially reexamined their guest statutes have done so in light of *Brown* v. *Merlo*, and the decision to retain or strike down the statute has been determined by the compatibility of the *Brown* rationale to the particular state's jurisprudence.

The Supreme Court of Delaware, in *Justice* v. *Gatchell* (1974), 325 A. 2d 97, after a thorough inquiry into the adoptability of the *Brown* v. *Merlo* rationale, upheld its guest statute by concluding that the Legislature is the prop-

er body to repeal it. The court, at page 101, also surveyed recent guest statute decisions, as follows:

"The Court of Civil Appeals of Texas unanimously declined to follow *Merlo*, and upheld the Texas guest statute. *Tisko* v. *Harrison*, Civ. App. Texas, 500 S. W. 2d 565 (1973). The Supreme Court of Kansas, in a 4-3 decision, adopted the basic rationale and conclusion of *Merlo*, and held the Kansas Guest Statute violative of federal and state equal protection constitutional guaranties. *Henry* v. *Bauder*, 213 Kan. 751, 518 P. 2d 362 (1974). The Supreme Court of Utah declined to follow *Merlo*, and unanimously upheld the guest statute of that state against a similar equal protection assault. *Cannon* v. *Oviatt and Martin*, Utah Supr., 520 P. 2d 883 (1974). The Supreme Court of Iowa, in a 5-4 decision, rejected the *Merlo* approaches to the problem and upheld the Iowa guest statute as constitutional under the equal protection clause, *Keasling* v. *Thompson*, Iowa Supr., 217 N. W. 2d 687 (1974). The Supreme Court of North Dakota, declining to test their guest statute under the federal Constitution, but following the *Merlo* approaches, unanimously found their statute violative of the 'arbitrary classifications' provision of the state Constitution in view of changing conditions occurring since the statute's enactment in 1931. *Johnson* v. *Hassett*, N. D. Supr., 217 N. W. 2d 771 (1974)."

This court's careful consideration of *Brown* v. *Merlo* forces us to conclude that *Brown* lacks persuasive force against the backdrop of Ohio law. To strike down our guest statute on authority of *Brown* would result in a "constitutional curiosity * * * [arrived at] by a process that can only be described as brute force," as Justice Harlan remarked in his dissenting opinion in *Glona* v. *American Guarantee & Liability Ins. Co.* (1968), 391 U. S. 73, 76.

However, under the analysis we have articulated, this court holds the Ohio guest statute, R. C. 4515.02, violative of Section 2, Article I of the Ohio Constitution, in that it denies equal protection and benefit of the law to the peo-

ple of this state by its grant of a special privilege and immunity to negligent drivers who injure nonpaying passengers; is violative of Section 16, Article I of the Ohio Constitution, in that it closes the courts and denies a remedy by due course of law to some but not all the people of this state; and is violative of the Fourteenth Amendment to the United States Constitution, in that it denies due process of law and equal protection of the laws to the people of this state.

Accordingly, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

O'NEILL, C. J., HERBERT, CORRIGAN, STERN, CELEBREZZE and P. BROWN, JJ., concur.

COURT OF APPEALS OF OHIO, SIXTH DISTRICT
COUNTY OF LUCAS

C.A. NO. 7840

Pena Nenoff, Ancillary Admrx. of the Estate of Neno S. Nenoff, Deceased.

APPELLANT

vs

George M. Thompson

APPELLEE

APPEAL FROM

COMMON PLEAS COURT

No. 203720 & 206839

DECISION & JOURNAL ENTRY

DATED: June 20, 1975

This cause came on to be heard upon the record in the trial court. Each assignment of error was reviewed by the court and upon review the following disposition made:

Appellant's assignments of error are as follows:

"ASSIGNMENT OF ERROR I
THE COURT ERRED ON MAY 4, 1970 IN GRANTING IN ACTIONS 206839 and 203720 THE MOTION TO CONSOLIDATE ACTION 206839 WITH ACTION 203720 FOR TRIAL.

"ASSIGNMENT OF ERROR II
THE COURT PREJUDICIALLY ERRED IN ACTION 206839 ON JANUARY 9, 1969 IN ENJOINING PLAINTIFF FROM TAKING THE DEPOSITION OF DEFENDANT GEORGE M. THOMPSON, AND THE COURT ERRED AS TO PREJUDICE ACTION 203720, AFTER 203720 HAD BEEN CONSOLIDATED, WHEN THE COURT ON MAY 7, 1970 IN ACTION 206839 AGAIN PREVENTED THE TAKING OF DEFENDANT THOMPSON'S DEPOSITION UNTIL THE MORNING OF THE SCHEDULED TRIAL ON MAY 11, 1970.

"ASSIGNMENT OF ERROR III
THE COURT ERRED PREJUDICIALLY IN DENYING PLAINTIFF'S MOTION OF MAY 11, 1970 TO RESTRICT QUESTIONING AND TAKING OF EVIDENCE ON DECEDENT'S FAILURE TO FILE INCOME TAX RETURN.

"ASSIGNMENT OF ERROR IV
PLAINTIFFS WERE DENIED THE RIGHT TO THE SELECTION OF A JURY CALLED AND MADE AVAILABLE ACCORDING TO LAW.

"ASSIGNMENT OF ERROR V
THE COURT PREJUDICIALLY ERRED IN EXCLUDING DECEDENT'S WIDOW, MRS. PAULINE NENOFF AND THE SURVIVING CHILDREN, DURING THE SELECTION OF THE JURY, AND THE TAKING OF THE EVIDENCE UP TO FINAL ARGUMENTS, ALTHOUGH EACH WAS A PARTY, AND EACH HAD A RIGHT TO, AND WAS NEEDED TO BE PRESENT SO AS TO PROSECUTE THEIR CLAIMS AND DEFEND THEMSELVES.

"ASSIGNMENT OF ERROR VI
THE COURT PREJUDICIALLY ERRED IN DENYING CROSS EXAMINATION OF DEFENDANT AS TO THE SPEEDS WHICH DEFENDANT KNEW WOULD HAVE BEEN EXTREMELY DANGEROUS TO HAVE TAKEN THE CURVE.

"ASSIGNMENT OF ERROR VII
THE COURT ERRED PREJUDICIALLY IN REFUSING TO ADMIT QUESTIONING AND THE COURT RECORDS ON THREE SEPARATE TRAFFIC COURT CHARGES INVOLVING SPEEDING, AND GUILTY PLEAS OR PAY OUTS BY DEFENDANT IN JULY, 1967, NOVEMBER, 1966, AND A CONVICTION IN OCTOBER, 1966, AS BEARING ON DEFENDANT'S ATTOTIDE (SIC) AND RESPECT TOWARD THE LAW, AND SPEEDING, AND HIS KNOWLEDGE OF WHAT WAS AND WHAT WAS NOT A LAWFUL SPEED.

"ASSIGNMENT OF ERROR VIII
THE COURT PREJUDICIALLY ERRED IN REFUSING TO ADMIT THE TOLEDO HOSPITAL RECORDS, DEFENDANT'S EXHIBITS 4 AND 5, AND RIVERSIDE HOSPITAL RECORDS, DEFENDANT'S EXHIBIT 3, RELATING TO DEFENDANT THOMPSON FOLLOWING THE COLLISION.

"ASSIGNMENT OF ERROR IX
THE COURT ERRED IN REFUSING PLAINTIFF TO CALL DEFENDANT FOR CROSS-EXAMINATION IN REBUTTAL ON THE POINTS RAISED BY DEFENDANT'S EVIDENCE, AND ALL THE SAME WOULD HAVE LED TO.

"ASSIGNMENT OF ERROR X
THE COURT PREJUDICIALLY ERRED IN NOT GIVING PLAINTIFF'S REQUESTED SPECIAL INSTRUCTIONS TO THE EFFECT THAT KNOWINGLY VIOLATING THE SPEED LIMIT WHEN THE DEFENDANT KNEW OR SHOULD HAVE KNOWN THE PROBABILITY OF HARM WAS GREAT, COULD BE FOUND TO BE WANTON MISCONDUCT.

> "COURTS IN OTHER JURISDICTIONS HOLD WANTON MISCONDUCT IS PROVED BY A KNOWING VIOLATION OF LAW PLUS CIRCUMSTANCES WHICH AN ORDINARY REASONABLE MAN SHOULD RECOGNIZE AS CREATING AN UNREASONABLE RISK OF INJURY.
>
> "AN ACTUAL KNOWLEDGE OR CONSCIOUSNESS OF THE PROBABILITY OF INJURY IS NOT REQUIRED.
>
> "IN NO DECIDED CASE ANYWHERE HAS THERE BEEN PROVEN AN INTENT TO INJURY; IF SO, THE DRIVING WOULD HAVE BEEN FELONIOUS, THE DEFENDANTS ALWAYS BELIEVE THEIR DRIVING IS SAFE, EVEN THOUTH TO A REASONABLE PERSON IT IS OBVIOUSLY RECKLESS AS HERE. THIS COURT EXCUSED DEFENDANT THOMPSON FROM LIABILITY IF THE JURY FOUND HE BELIEVED HIS DRIVING WAS SAFE, EVEN THOUGH HIS DRIVING IN FACT WAS OBVLIOUSLY EXTREMELY DANGEROUS. DEFENDANT THOMPSON WAS THUS EXCUSED BY AN INSTRUCTION NOT JUSTIFIED BY THE LAW.

"ASSIGNMENT OF ERROR XI
THE COURT PREJUDICIALLY ERRED IN GIVING DEFENDANT'S INSTRUCTION 9, AND IN REFUSING AT THE CLOSE OF THE COURT'S INSTRUCTION TO MAKE CLEAR THAT IMPLIED KNOWLEDGE -- WHAT SHOULD HAVE BEEN KNOWN OF THE PROBABILITY OF INJURY -- WAS SUFFICIENT

FOR WANTON MISCONDUCT, AND THUS THE COURT GAVE THE JURY TO UNDERSTAND DEFENDANT HAD TO KNOW HE WAS GOING TO HAVE AN ACCIDENT, OR INTENDED INJURY, BEFORE THE JURY COULD FIND FOR THE PLAINTIFF.

"ASSIGNMENT OF ERROR XII
THE TRIAL COURT PREJUDICIALLY ERRED IN REQUIRING PLAINTIFF TO MEET THE REQUIREMENTS OF THE GUEST STATUTE, WHICH WAS UNCONSTITUTIONAL: AND THE COURT FURTHER ERRED IN ITS INSTRUCTIONS GENERALLY IN PLACING TOO STRICT A BURDEN ON PLAINTIFF AS TO WANTON MISCONDUCT: AND ALSO IN NOT INSTRUCTING THAT PLAINTIFF'S DECEDENT WAS ENTITLED TO A PRESUMPTION OF DUE CARE TO PRESERVE HIS LIFE.

"ASSIGNMENT OF ERROR XIII
DURING THE COURSE OF THE TRIAL THE COURT MADE VARIOUS RULINGS WHICH HAD THE EFFECT OF PREJUDICING PLAINTIFFS AND THEIR COUNSEL BEFORE THE JURY, AND THE ERRORS, TAKEN TOGETHER, DENIED PLAINTIFFS A TRIAL BY LAW: AHD PLAINTIFFS MOTION FOR NEW TRIAL AND JUDGMENT NOTWITHSTANDING THE VERDICT SHOULD HAVE BEEN GRANTED."

As to the first assignment of error, appellant urges that there was prejudice because the surviving spouse, Pauline Nenoff, and children could not be present during the selection of the jury, but were excluded from the courtroom on motion for separation of witnesses. The court finds from the record that there was no objection to the exclusion of the surviving spouse, Pauline Nenoff, and children; the court further finds that the said surviving spouse and the children testified at length, and appellant does not illustrate how she could have been prejudiced by the absence of said persons during the selection of the jury. Said actions were proper actions to be consolidated under former R.C. 2309.64. Cf. Civ. R. 42 - 18. Said assignment of error No. 1 is found not well taken.

As to assignment of error No. II relative to the taking of defendant Thompson's deposition, the court finds from the record that there had been exhaustive pre-trial discovery and that the defendant George M. Thompson had been deposed on two other occasions and was called in the trial as a witness as and for cross examination. The record indicates that the appellant was fully apprised of appellee's testimony. Assignment of error No. II is found not well taken.

As to assignment of errot No. III relative to the Court's failure to restrict questioning and taking of evidence on decedent's failure to file an income tax return, appellant waived any privilege and, by filing the lawsuit, placed in issue the earnings of the decedent prior to his death. Appellant's limited brief on this assignment of error fails to show that appellants were prejudiced. Said assignment of error No. III is found not well taken.

Assignment of error No. IV relative to the selection of the jury called and made available according to law, is not well taken in that appellants waived any objection at trial. The court further notes that plaintiff-appellant failed to perfect her objection and thus waived the right to thereafter complain. Appellant further shows no prejudice. Said assignment of error is found not well taken.

Assignment of error No. V repeats the arguments asserted under assignment of error No. I and for the same reasons as set forth under assignment of error No. I this court finds assignment of error No. V not well taken.

Assignment of error No. VI pertains to the alleged limitation and denying cross examination of defendant as to speeds which defendant knew would have been extremely dangerous to have taken while executing the curve

involved in the accident. The court finds from the record that the cross examination by the appellant of the defendant was in depth on all matters which were relevant and competent and that the line of questioning which was restricted was an effort by appellant to have the defendant testify as to a conclusion and on issues reserved for the jury. Assignment of error No. VI is found not well taken.

Appellant's seventh assignment of error is relative to three separate traffic court charges involving speeding and guilty pleas or pay-outs for violations which occurred prior to the accident in question. The court finds that there is no record or foundation for this claimed error on appeal, and that said records were not relevant to the issue in question and course of conduct. Se 21 O. Jur 2d 220 et seq., Evidence, Secs. 208-212. Said assignment of error is found not well taken.

Assignment of error No. VIII that the court erred in refusing to admit the Toledo Hospital records relative to the defendant's condition following the collision is claimed to be prejudicial in that appellant's counsel was hurt and made to look inept. This court, after reviewing the record, does not find that the jury would conclude that plaintiff's counsel did not know what was proper proof or that plaintiff's counsel failed to identify with the jury by reason of any rulings of the trial court. Said assignment of error is not well taken.

Assignment of error No. IX is in reference to the court's refusal to permit appellant to call defendant for cross examination in rebuttal on points raised by defendant's evidence. The trial court's ruling was based on R.C. 2315.01(D) and the court was correct in limiting appellant in rebuttal to rebutting the evidence produced by defendant and in not permitting

appellant to re-open her original case. See Cities Service Oil Co. v. Burkett (1964), 176 Ohio St. 449. Assignment of error No. IX is not well taken.

Assignments of error Nos. X and XI are relative to appellant's request for special instructions. As is stated in the judgment entry overruling plaintiff's motion for a new trial (that court) and this court cannot conclude that the rejection by the trial court of the special instructions tendered by the plaintiff was either error or created prejudice. This cause is controlled by R.C. 4515.02, sometimes known as the Guest Statute. The trial court gave a complete and proper charge relative to the statute and the applicable Ohio law. See Bailey v. Brown (1973), 34 Ohio St. 2d. 62. The trial court also charged on the defense of assumption of risk without objection by appellant. The jury returned a general verdict and it is, therefore, concluded that the jury found on all issues for the prevailing party. See Miller v. Johnson (1953), 68 Ohio L. Abs. 513; Wever v. Hicks (1967), 11 Ohio St. 2d. 230; Smith v. Flesher (1967), 12 Ohio St. 2d. 107; Walczesky v. Horvitz Co. (1971), 26 Ohio St. 2d. 146; 3 O. Jur. 2d. 702. App. Rev., Sec. 736, 4 O. Jur. 2d. 359, App. Rev., Sec. 1038; R.C. 2309.59, Harmless Error Statute. Assignments of error Nos. X and XI are not well taken.

Appellant's twelfth assignment of error is, in the main, relevant to the issue of constitutionality of the Guest Statute. Appellants did not challenge the constitutionality of the Guest Statute in the trial court. Appellant cannot challenge it now in this appeal. Appellant offers no citation or discussion relative to his proposition that the trial court failed to charge the jury that the decedent exercised ordinary care to preserve his life. Said assignment of error No. XII

is found not well taken.

Appellant's thirteenth assignment of error is to the effect that the trial court, by its rulings, prejudiced the plaintiff and plaintiff's counsel before the jury. This court finds that the trial court conducted a fair and impartial trial and maintained proper judicial decorum and temperament, and said assignment of error is found not well taken.

This cause and the trial thereof occupied many days and many hundreds of pages of record. Considering the totality of the evidence and of the proceedings, the issues were fairly and properly joined and credible evidence was submitted for and against said issues. As presented and as charged, the issues were matters for the trier of the facts. The verdict of the trier of the facts is not manifestly against the weight of the evidence nor is the judgment contrary to law.

The judgment of the Common Pleas Court of Lucas County is affirmed at appellant's costs. Cause is remanded to said court for costs.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Ten (10) days from the date hereof this document shall constitute the journal entry of judgment and shall be file-stamped by the Clerk of the Court of Appeals, at which time the period for review will begin to run. App. R. 22(E).

Clifford F. Brown, P.J., /s/ Clifford F. Brown
Presiding Judge

John W. Potter and /s/ John W. Potter
Judge

*Joseph E. O'Neill, JJ /s/Joseph E. O'Neill
Judge
concur.

*Judge Joseph E. O'Neill of the Seventh Appellate District, sitting by assignment of the Chief Justice of the Supreme Court of Ohio

COURT OF APPEALS OF OHIO, SIXTH DISTRICT

COUNTY OF LUCAS

C.A. NO. 7840

Pena Nenoff, Ancillary Admx. of the Estate of Neno S. Nenoff, Deceased	APPEAL FROM COMMON PLEAS COURT
APPELLANT	NO. 203720 & 206389
vs	DECISION & JOURNAL ENTRY
George M. Thompson,	
APPELLEE	

DATE: October 31, 1975

This cause came on to be heard upon the record in the trial court. Each assignment of error was reviewed by the court and upon review the following disposition made:

The two cases arose out of an accident which occurred September 19, 1967. Two actions were filed, #203720 on January 12, 1968, a wrongful death action, and #206839 on September 18, 1969, a survivorship action. The cases were consolidated for trial. A jury trial resulted in a verdict on May 25, 1970, for the defendant in both cases. A series of motions and delays, delayed the filing of a final appealable order until October 9, 1974. Notice of appeal was filed in this court November 8, 1974. A decision and journal entry was rendered on June 20, 1975, on appellant's thirteen assignments of error. Thereafter, appellant filed her motion for reconsideration. Plaintiff's motion for reconsideration came on for consideration by the court on briefs filed by both the appellant and appellee.

Also filed was a motion for Kelsey Bartlett to reconsider the order overruling his motion to file a brief as amicus curiae. For the reasons set forth in the court's original order and also for the reason that the motion for reconsideration was filed far out of rule, said motion is overruled. Appellee's motion to dismiss is granted. The clerk is ordered to return to Mr. Bartlett his motion and briefs.

The motion of appellant for reconsideration is considered only as it relates to appellant's assignment of error No. 12, to wit:

> "ASSIGNMENT OF ERROR XII
> "THE TRIAL COURT PREJUDICIALLY ERRED IN REQUIRING PLAINTIFF TO MEET THE REQUIREMENTS OF THE GUEST STATUTE, WHICH WAS UNCONSTITUTIONAL: AND THE COURT FURTHER ERRED IN ITS INSTRUCTIONS GENERALLY IN PLACING TOO STRICT A BURDEN ON PLAINTIFF AS TO WANTON MISCONDUCT: AND ALSO IN NOT INSTRUCTING THAT PLAINTIFF'S DECEDENT WAS ENTITLED TO A PRESUMPTION OF DUE CARE TO PRESERVE HIS LIFE."

Appellant's supplemental memorandum was filed by permission of this court after the announcement of the decision in Primes v. Tyler (1975), 43 Ohio St. 2d. 195, holding R.C. 4515.02, the "Guest Statute", unconstitutional. Appellant contends she is therefore entitled to a new trial and appellee asserts that the Primes case does not control the cases sub judice.

We hold that under the facts of this case, the Primes case, supra, and also the reference to Nealy v. Wingard, 75-365 Ohio Bar XLVIII, July 28, 1975, do not apply.

In causes No. 206839, wanton misconduct was specifically alleged along with a prayer for compensatory, punitive and exemplary damages and attorney fees. Cause No. 203720

asserted negligence, but plaintiff endeavored to establish that Nenoff was a passenger under one of the exceptions to the guest statute. The trial court found, as a matter of law, that Nenoff was not a passenger. Plaintiffs in the trial court did not in either case assert that the guest statute was unconstitutional.

Special instructions were requested by appellant and given. No objection was made by appellant to the fact that the general charge instructed the jury on the issues of willful and wanton misconduct and there was no request for the court to charge on the issue of negligence.

Section 2321.03, R.C., then in effect controlled as to the alleged errors of commission. Hasapes v. Drake (1970), 24 Ohio St., 2d 1, refers to this section and holds that a party cannot take advantage of errors he induced. The rule in effect at the time of the trial, as to alleged errors of omission in a charge, was that as to these a party must object. See Rhoades v. Cleveland (1952), 157 Ohio St. 107.

Further, as stated in 3 O. Jur. 2d. 40, App. Rev., Sec. 185, et seq., a party cannot lie by, take the chances of success on one ground, and then upon failure object. See also State v. Childs (1968), 14 Ohio St. 2d. 56; State v. Glaros (1960), 170 Ohio St. 471.

It has been recently asserted in State v. Morris (1975), 42 Ohio St. 2d. 307, that it is a general rule that an appellate court will not consider any error which could have been called to the trial court's attention at a time when such error could have been avoided or corrected, but such was not done. This principle also applies to the question of the constitutionality of statutes, and constitutional questions not raised in the trial court will be deemed waived, see Cuthbertson v. State (1922), 106 Ohio St. 658; Village of Clarington v. Althar

(1930), 122 Ohio St. 608; State v. Webber (1955), 163 Ohio St. 598; Columbus v. Ewing (1957), 77 Ohio L. Abs. 31; City of Toledo v. Gfell (1958), 107 Ohio App. 93.

The case of Primes v. [redacted]ler, supra, did not speak to the issue of raising the constitutional question in the trial court. The case of Nealy v. Wingard, supra, was one involving dismissal after opening statements.

Other matters referred to in appellant's motion for reconsideration and briefs reiterate arguments previously adequately disposed of in this court's decision of June 20, 1975.

For the reasons set forth herein and in our decision of June 20, 1975, we adhere to our decision of June 20, 1975, and appellant's motion for reconsideration is denied. The decision of June 20, 1975, is ordered filed as the judgment order of this court.

John W. Potter, and

Joseph E. O'Neill, JJ., concur.

Clifford F. Brown, P.J., dissents.

_____
Judge

_____
Judge

Jodge Joseph E. O'Neill of the Seventh Appellate District, sitting by assignment of the Chief Justice of the Ohio Supreme Court.

* * *

BROWN, P.J., dissents and expresses the view that the judgment of the Common Pleas Court should be refersed and the cause remanded for further proceedings on authority of the Ohio Supreme Court decision in Miranda Nealy et al, Appellants v. Renee L. Wingard, et al, Appellees, 75-365, Ohio Bar XLVIII, July 28, 1975. The judgment of the Court of Appeals in Nealy, supra, was reversed on authority of

Primes v. Tyler, 43 Ohio St. 2d. 195, both cases, therefore, holding that the Ohio Guest Statute, Sec. 4515.02, R.C., is unconstitutional. In the Nealy case, supra, the legal issue of constitutionality of the Ohio Guest Statute was not raised in the trial court nor in the Court of Appeals on appeal. By contrast in the present Nenoff v. Thompson case, the issue of constitutionality of the Guest Statute was raised by plaintiff-appellant in the Court of Appeals, and is, therefore, a stronger case factually with a better reason justifying relief in favor of plaintiff than the facts and reason for judgment for the plaintiff in Nealy v. Wingard, supra. Fujioka v. Kam (Hawaii Sup. Ct., 1973), 514 p. 2d. 568; Rainwater v. Haynes (Ark., Sup. Ct., 1968), 428 S.W. 2d. 254; Roberts v. Spray (Ariz. Sup. Ct., 1950), 223 P. 2d. 808.

Note: Pages 30-33 omitted because repetitious of Assignment of Errors.

IN THE COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO

Pena Nenoff, Ancillary Administratrix of the Estate of Neno S. Nenoff deceased	)	No. 203720 and 206833
	)	Filed and Entered October 9, 1974
PLAINTIFF	)	JUDGMENT ENTRY
vs	)	(Opinion of Trial Court Overruling Motion for New Trial)
George M. Thompson	)	
DEFENDANT	)	

This matter came on for hearing upon motions for new trial and for judgment notwithstanding the verdicts in the two captioned cases. It should be noted that the trial judge in the merit hearing upon the petitions, having received ahigher calling, was not available nor with authority to hear the motions and they were thus assigned to the writer for hearing and determination. Suffice it to say that not being the trial judge severely handicaps anyone called upon to rule on such motions - and particularly the motions herein since personalities have been so strongly interjected in the writings, briefs and the actual oral hearings on same. Further, the hearings on these motions lasted more than two normal working days of the Court and much was left unsaid since the transcript of the trial proceedings was not furnished to this Court at that time.

Some five months lapsed between hearing and presentment of the transcripts and it thus became the task of this Court to try to reconcile its motion hearing notes with the transcript to see if what the respective counsel alluded to was there and what posture it had when viewed in the context of the things said or done before it or after it, rather than in

the abstract as presented at the motion hearing. Then it became the task of trying to relate the motion hearing notes and those transcripts to the lengthy motions and their specific points since all counsel specifically stated that they incorporated all those points in their oral presentation whether argued or not and, much to the further consternation of this Court, it found that it had no specific references to search in the transcripts for and it became necessary to read, re-read and read again the entirety of some 1000 pages to find the point raised. The task was additionally complicated because the partial transcript had to be re-numbered when the entire transcript was insisted upon by the Court and pages had to be then inserted, i.e., page numbers mentioned then no longer corresponded to the complete transcript. To summarize the above, this Court wishes to state that it makes no apologies for what seems to have been an inordinate amount of time in making this rendition in light of the task it was presented to perform.

To try to assist some potential reviewer of this effort, this Court will endeavor to make specific reference on each point and where it may be located.

To commence, the Court totally rejects an instrument presented to it entitled "Affidavit of Hazel D. Juhnke, Juror No. 1", in that it is not an affidavit, i.e., Hazel D. Juhnke has not signed the same and the statement of one of the trial counsel, even under oath, does not make it such. And, further, even if it were an affidavit, this Court would, and does, reject the same from any consideration due to the well established alinude evidence rule in Ohio (see Ohio Jur. 2nd - 252 Trial Sec. 326 et. seq.) and no "outside" cooberative matters are presented to the Court to establish any of the exceptions to the rule.

Further, the Court does reject in its considerations an instrument filed herein entitled "Narrative Bill of Exceptions." There was no showing presented to the Court that statutory procedures were followed in its preparation and presentation into the case. It was never submitted to opposing counsel nor to the trial court. Its use was objected to by defendant's counsel at this hearing on those foundations and plaintiff's counsel furnished no argument to the Court in contradiction thereof.

The Court proposes at this juncture to consider the motions as filed in Cause No. 203720 and those in Cause No. 206839 as one in the same. Upon observation it will be noted that the wordages are in essence the same and cover the same proposals. Consequently, the Court's findings, conclusions and rulings made herein shall be as to both causes even though in narration the singular person or inference may be made or used. Once again, in an effor to lay a path for others to follow, this Court shall, where it finds a similarity of purpose or proof, rule on the various motions and their various specifications as follows:

	FILING	REFERENCE
1.	Motion for New Trial by John G. Rust	R.M. #_____
2.	Affidavit of Kelsey D. Bartlett	B.A. #_____
3.	Two Volume Transcript of Trial	T.1 P. #____ or T.2 P. #____

The Court cannot conclude that the rejection by the trial court of the special instruction prepared by the plaintiff (R.M. last paragraph - unnumbered) was either error or created prejudice by its not being given to the jury. In this review of that instruction (see attachment to R.M.) this Court finds that it is not a complete statement of the proposition of law involved, that it is cumbersomely

worded in that it could potentially create a jury impression that a finding of any one of its specifications would be sufficient and that simply is not the controlling law in the State of Ohio on willful and wanton negligence cases. Simply stated, the proposed instruction was not clear as to the consideration that the triers of fact were to give as to its entirety and in its posture could create great confusion. In addition to this, this Court does not find that the plaintiff perfected any objection to the trial court's rejection of the special instruction (see T.2 P. #559 to 561) and thus waived the same. Additionally, this Court finds that the trial Court did give a correct and exhaustive charge on the matters covered in the rejected instruction (T.2 P. 574 to 580). And, lastly, the trial Court did give the "ought to have known" conditions repeatedly which included plaintiff's special instruction 2.A (T.2 P. 563-2) and, quite frankly, this Court fails to understand the contention made by plaintiff's counsel that it was not done (see T.2 P 594 and Page 6 comments in Mr. Rust's Memorandum in Support of Motion for New Trial etc.).

This Court is unable to find that any of the special instructions or the general charge contradict each other, either internally or read side by side. Quite naturally different sides of propositions of law are presented and if not kept in context they appear to be contradictory. However, they are correct propositions of law that do apply to the facts of the cases and it is a jury function to determine which side of a proposition of law to accept in light of the facts as they find them to have been proven. It seems only fitting and proper to state that it appears to this Court that the failure to give the general charge as given would have been error since it would not have otherwise been the complete law as it applied to this case.

To summarize then, this Court finds that the special instruction that was rejected was done so with cause, that no perfection was made of the objection (none was ever made) to its rejection and was thus waived, the special instructions as given were proper, the general charge was proper, the terms of neither were contradictory, and there was no undue placement of the burden of proof. Willful and wanton misconduct was interjected by plaintiff's own case in chief and had to be charged upon as was done.

As to points two and three reserved by plaintiff's counsel (T.2 P. 595) the Court now finds that there were no special instruction requests on same and that the propositions as contained in the general charge covering these two points were properly presented to the jury. Consequently, in view of the foregoing comments by this Court, it can find no basis for error, abuse of discretion or creation of prejudice.

Moving on to the matters of depositions taken and/or restrictions on the same (R.M. #1) the Court notes from the files that the restrictive order of the Court to prevent repeated depositions of the defendant was "lifted" and entry filed to that effect on May 7, 1970. The record is not clear why the apparent third deposition of the defendant was not taken till the morning of trial (4 days later). In any event it appears to this Court that all of the issues in both cases were well known to all parties well in advance of the January restraining order. It further appears that the two prior depositions of the defendant must have been exhaustive since they lasted almost a full day each. It should be noted that those depositions were taken at a point in time when the original action pending had contained both of these causes of action (after filing, the

original action was amended to delete one of the causes of action and that deleted part became the 2nd case filing herein). There has been presented to this Court no showing that plaintiffs had anything further to inquire of that had not already been inquired of - or at the very least had been afforded the opportunity to inquire of. The Court agrees with the tenant that repeated depositions of a witness constitute a harassment unless there is some clear showing that something had been unavoidably overlooked or is of such a new nature that it was unknown at the time of one of the earlier depositions. Apparently the trial court afforded plaintiffs the opportunity of a limited area of inquiry on the crucial matter in the causes to see if anything new had developed. It was transcribed and in the hands of counsel prior to the witness being on the stand. Apparently nothing "new" was determined -- or at the very least nothing was made of it when the witness did take the stand (T.1 P.80 et seq). The Court finds no abuse of discretion on the part of the trial court in regard to its actions on this facet.

As to the point raised on the proposed restriction of evidence (R.M. #2), it appears that the plaintiff proposed his motion in limine. This Court is of the opinion that a portion of the trial court's ruling was in error, i.e., that it was not timely filed or made (the motion). It is this reviewer's impression that In Limine motions have no "set" times to be made within and, from necessity, some times will occur during an examination of a witness or in the production of exhibits and consequently are not amenable to such time limitations. By this same token, there must be a very clear showing to grant such a matter or it may well be too restrictive and particularly so if the topic matter is even tangentially touched upon by the opposition. In this vein,

then, this Court must agree in part with the trial court's ruling in that it would be a limitation on cross examination and until the matters are touched upon either in direct or cross examination the trial court is unable to intelligently rule on the matter. The matters contained in the motion were so overly broad (T.1 P. #2-A, B, C and G) as argued that it in all probability was impossible to segregate what may or may not have been alluded to. Further, this Court is of the opinion that Federal and State Income Tax returns have long been accepted as a manner in which earnings may be established or used to attack the creditability of other evidence. Certainly, earnings and ability to support are a vital part of survivalship actions both for the plaintiff and defendant. Specific reference is now made to the only point that these matters were raised (see T.2 P. 373-28, 29 and 30) and upon review it appears that timely objection was made, overruled and when the witness expressed no knowledge of such returns the matter was abandoned as a means of testing creditability of testimony on his earnings and how much the decedent had spent on his family members and relatives. It appears as though the same was properly handled and abandoned without the creation of prejudice and is a point without merit in plaintiff's argument in this Court's opinion.

Moving to the point of an improper array of persons to choose jurors from (R.M. #3 and B.A. #9, 10 and 11) the Court finds no formal filing of such a challenge and only one brief mention of it (see T.I. P.2). This Court notes the trial Court's statement therein and notes the lack of the continuing of the challenge by the plaintiffs. This Court must therefore conclude that plaintiff failed to perfect his objection and thus waived the right to use the same herein. Additionally, there is no

demonstrative showing that any one was prejudiced or hampered in any way by not having more prospective jurors waiting in the "wings" nor any serious contention that those present were not qualified to be such and were properly arrayed and selected. This Court concludes that point to be without merit and to have been waived as a basis for new trial.

On the matter of the joinder of these two causes (R.M. #4) the Court wishes to acknowledge the Fielder case (1580.S.375) wherein the court states they are not properly joinable causes of action, i.e., wrongful death and survivorship but also wishes to recognize the very strong dissent. The next acknowledgment is of the Lopresti case (1600.S.480 at page 487) wherein the same writer of the majority opinion in the Fielder case acknowledges the statutes of Ohio and that joinder is permitted, i.e., "you can't complain if your motion caused the joinder." It appears to this Court that Hart, J. was aware of Ohio Revised Code Section 2309.64 in his later opinion. This Section provides the implementation of the joinder statute (2309.05) by the defendant which was followed in this situation. The defendant did move to join and the Court by judgment entry filed on 5/7/70 that the causes could have been, ought to have been and did so then order that they be joined. It appears to this Court that the plaintiffs abandoned their opposition to the joinder (no appeal from the order was perfected) and elected to proceed to trial four days later without even mention to the record that they still didn't like the idea. The Court is of the opinion that there was proper grounds for joinder and that plaintiffs by not perfecting their objection waived their right to now complain of the same. It is also worthy of note that the argument may well be one in vain with the advent or Rule 18 of the Ohio Rules of Procedure.

This Court finds itself with a sort of "shotgun" blast in the next specification (see R.M. #5) and will confine itself, as a consequence, to the numbered sub-paragraphs therein:

R.M. 5-A: No record was perfected of any objection posed by the plaintiff at the time of Voir Dire (see T.I. P5 and 5-A) and if plaintiff found some fault with the manner of the examination or what was permitted to be inquired of, clearly it was his duty to perfect that objection and make his record. He apparently chose not to and obviously there is little this Court can now do about whatever it may have been. It would appear that the trial court conducted its portion of the Voir Dire of the prospective panel with propriety and dispatch.

R.M. 5-B: This Court is of the opinion that the parties are not entitled to more than the allowable pre-emptory jury challenges, i.e., four per side. The parties were the same and the issues were the same. The only difference was when it came to verdict time; the jury was compelled to hold the same in both causes (on the issue of negligence) and the only basic difference would have been the facts and law as it pertained to arriving at dollar amounts if the jury had gotten that far. To say otherwise would be to allow a plaintiff 12 pre-emptories if he had three causes of action in his petition. Clearly, pre-emptories go to "parties" and not to "causes."

R.M. 5-C: Obviously, this Court was not present during the matters here in question (see T.1 P. 68-19 to 23) and must rely upon the transcript and the oral arguments. The Court is unable to find anything

critical with the trial court's comments and after reviewing all of the testimony on the issue (see T.1 P.5-J to 5LL and 68-1 to 68-34) would view that the trial court did fairly summarize what had been accomplished in those pages. It further appears that there was no abuse in the judge's use of discretion in attempting to limit much repetition and to move on to other issues. Defendant had acknowledged the accident site and proof of the site was unnecessary -- or at the very most needed only brief testimony on its location. How to drive at a particular area is one thing but to keep trying to prove that there "is" such an area is another matter. This Court can find no error in the rejection of photographs as they were presented and defendant's counsel may well have been remiss in his duties had he not objected to their use. This Court cannot find any abuse of proper cross examination on the part of the defense and it was never called upon to specifically stipulate to similarity of conditions; foundation seeming to have been to the use of photographs that were taken just before the trial to accurately portray a scene some 2-1/2 years before. This Court is unable to find such critical comments that would create prejudice of the import alleged by the plaintiffs.

R.M. 5-D: This Court feels that it is within the sound discretion of a trial court to limit rebuttal evidence to those things that transpired in the side of the case just before it. The plaintiffs had called the defendant as and for cross examination (T.1 P.80 to 134) and rather exhaustively pursued every path. The defendant did not testify in

his own side of the case. This Court rejects the contention that a party may be called as and for cross examination as many times as the opposition wants. This is clearly within the discretion of the Court and where the attempted use is to go over the same matters that were covered in the first time he was called, the allowance would in essence amount to never requiring a party to rest his case. To allow a party to re-open his case to establish some matters is one thing (if there is a sound showing for it and the Court permits it) but to attempt to do so by rebuttal without leave of the Court and to attempt to do it by use of the adverse party himself is repugnant to this Court -- especially so where they have examined him once and he hasn't even testified in his own side of the case. This Court, further, can find no comment by the trial court that was of such an import to show that it was "siding" with either side of the cases.

R.M. 5-E: Since this has no reference to exactness this Court can find no place to comment upon and will assume that plaintiff's co-counsel (see B.A. 1 thru 42) has covered his own objections. At this juncture the Court can find no basis for the point alleged herein.

R.M 5-F and B.A. #12: This Court finds that plaintiffs made no objection, proffer or issue of the fact that the decedent's widow was excluded until she testified. It might be and it might not be proper in some cases to exclude a widow who is not a party to a cause. Under the general rule that a witness shall be excluded from the Court Room until he or she testifies (other than a party to the action)

after such a motion made, it becomes a matter of discretion of the trial court to determine if exception ought to be made. One must keep in mind that these causes were consolidated and one of those causes did not involve the decedent's widow nor her claim as the real party in issue. Without some showing made to the trial court as to why she should not be treated as a generally "excluded" witness, for all this reviewer knows, the trial court may have in the exercise of its discretion decided that the widow's presence may have prejudiced the one case -- there is simply no way of knowing. Without even an objection made by plaintiff's counsel (let alone some effort to show cause to the trial court why she should be allowed to stay), this Court has mere conjecture to go on and this it will not do. Additionally, this court can find not one instance where the plaintiffs were hampered in their examinations or trial tactics by the widow not being at their side; and more interestingly, even after complete transcription has been made, plaintiff has not in written brief or by oral argument presented any showing where they were hampered or prejudiced by her being absent until after she had testified. After a review of the transcript and a lack of <u>any</u> effort by counsel to have her remain, it appears to this Court that plaintiff's counsel now seeks this as a matter of importance for appeal but of no consequences at the time. Their failure to perform now precludes them.

<u>R.M. 6</u>: This Court has read the transcript and all the briefs and can find no misconduct on the part of the jurors (except as will be noted by the Court in the undertaking of what is known herein as B.A. #____), the defendant or his

counsel. Lacking specificity in this allegation, the Court has no alternative but to disregard the same.

R.M. 7: Once again this Court has read the transcript and, given such a "shotgun" approach, the Court has no alternative but go on its own (I do not even attempt here to list each objection and rulings and review of same -- having quit countng after reaching over 100 such instances.) Some rulings are not agreed upon by this review and some only in part; however, the totality, considered singularly and in their composite, do not constitute such error as to have prejudiced either side of the cause. No trial can be totally free from error. Additionally, not only must error be found but it must prejudice one side or the other to the extent that substantial justice was not performed. This reviewer can't find that, and not being pointed in any direction by movant, must conclude that its findings are correct. The Court notes some specificity later on and will tend to those matters then. Generally this Court would comment that in some areas, had counsel paid better attention to the trial court's rulings on his phrasing of questions he might well have attained better self satisfaction in getting some matters into evidence.

R.M. 8: This Court is unable to determine the nature of the allegation (see T.I. P. 119). The witness answered the question about "to drive as he was driving" and he responded "I don't know." The next question was not about "his" driving but rather as generalization which applied to every one and was, in this Court's opinion, one of the ultimate jury questions, i.e., to move from extreme danger to wanton

or wilful disregard. This Court can find no foundation for the speculation that a response would have lead to an "admission" as they contend. Counsel chose to abandon the line of questioning rather than attempt inquiry to get this witness's personal admission about his personal conduct. Again, hind-sight trial tactics can't be foundation for prejudicial error of the import to warrant a new trial.

R.M. #9: As to this point the Court notes that the issue first arose at T.I. P#122. It is noted that no proper foundation was laid for the type of inquiry made by plaintiff's counsel and the trial court properly sustained the objection (a plea of guilty can make a criminal matter competent but the innuendo of "arrest" without prioer foundation is clearly prejudicial before a civil jury.) Had this Court been called upon to rule a mistrial (see T.I. P. #123) it might not as quickly reserved a ruling.

The matter next arose through a rather long and rambling narration at T.2 P.#338 thru 342 and 346 thru 355-1 and then again when a Toledo Municipal Court Deputy Clerk appeared to testify in Chambers (see T.2 P.#355-34 and 356 thru 359). This Court notes that plaintiff's counsel did not perfect its objection to the Court's rulings upon previous criminal causes and thus waived the same. If one were to view the matters as proffered or otherwise perfected, this Court is of the opinion that the trial court properly ruled on their admissability. The law appears to be quite clear that there have to be guilty pleas and that the incidents have to be relatively close in point of time and have relevancy to the issue of similarity and a course of conduct at a type of

circumstance. Additionally, there appeared a very material fact lightly passed over by all counsel in that no original affidavits were ever produced and only entries from dockets and Journals were mentioned. The point is without merit.

R.M. #10 and B.A. #39: As to the matters of the hospital records, this Court almost became as confused as trial counsel. It is to be noted that the parties rambled all through the record covering many topics and never really came to grips enough with this issue until the very end of the trial to enable the trial court to intelligently rule on the matter. All counsel began at T.I. P. 27 and 28 with an agreement that no one would have to appear to establish that the proposed exhibits were the authentic records of Riverside and Toledo Hospitals and that either side could use them subject to the trial court's rulings on relevancy and competency. The Court accords this the status of a stipulation. Both counsel proceeded to limited use of parts thereof (Def. at T.I. P. 28 and 30 and Plt. at T.I. P. 70, T.2 P. 538 and T.2 P. 538-1 thru 538-6). At T.2 P. 472 the exhibits were offered and admitted and withdrawn in part due to alleged hearsay and lack of authenticity due to lack of responsible or indentifiable person taking part of the record. At T.2 P. 538 plaintiff gained the concession from a woman (who was defendant's wife at the time) that her signature appeared on two places but her prior testimony was that no one had gotten any information from her, she had given none and had signed where asked on all papers. Thus the matter was again in issue. Plaintiff then called a record librarian from one of the hospitals and

was unable to secure the "chain" of persons involved in the taking through the preparations of the records and the Court quite properly ruled that since no one can tell or know where the social history came from, it becomes hearsay. As a consequence of further confusion and a breakdown in the agreement (stipulation), the Court then ordered the removal of all exhibits of same and refused to fracture the records (see T.2 P. 551-52). The matter was then concluded at T.2 P. 554 thru 556 where the Court did, after plaintiff conceded the confusion and problem with the Toledo Hospital Records, rule that all would go out until properly authenticated. It would appear to this Court that this was the only sound ruling the Court could make since the agreement was to both sets of records and when one fails the agreement no longer becomes a sound stipulation. The issue was not who could or who could not use the exhibits but basically were they properly before the Court. The Court afforded the opportunity for the counselors to open the matter up, i.e., excluded the exhibits until authenticated by an expert, but no one took the iniative. Once again it appears to this Court that the plaintiff's counsel became so involved with "business records" arguments that they missed the basid issue and the point of the Court's ruling. Most certainly the introduction of an exhibit in a criminal matter does not ipso facto make it admissable in a civil action. B.A. #39 reference to page 435 of T.2 is lost in context since it is only a place where an exhibit was numbered but no one word was said of it to the witness.

R.M. #11: (An apparent repetition of R.M. #5(d) and will not be further commented upon.)

R.M. #12 and R.M. #13: Lacking specificity this Court knows not what reference is made to. Generally, once again, the Court has pursued the entirety of the record and while not necessarily being in 100% accord with the trial court, it can find no error of substantial consequence that can be considered individually or collectively of such import to have created prejudicial error.

R.M. #14: (An apparent repetition of R.M. #6 and will not be further commented upon.)

R.M. #15: This Court can find no basis for surplanting its judgment in the stead of the triers of fact in the cause. In a toality of review it appears that all of the issues were joined with credible evidence posed and opposed. It is present opinion that the issue of conscious pain and suffering by the decedent could only have been made by the coupling of an inference upon an inference; not being a permissable premises for the triers of fact to proceed upon, the Court properly removed that from their consideration (see T.2 P. 583). The jury in their verdicts were 11 to 1 and this Court can find no foundation that the same was arrived at through passion, prejudice, mis-direction or other improper means. Consequently, the Court has no alternative but to consider that they exercised their perogatives as to fact findings and made their verdicts in accordance. With an 11 to 1 verdict, one is sorely put to arrive at an opinion that there was much confusion in their midst. This Court would wish also to comment in regard to the note sent out by the jurors that no one perfected any type of record for this Court to review. Generally, their inquiry

was must they hold for the plaintiff in both cases and the response was yes. Obviously under the fact pattern there was no conceivable other response. No one contends that the answer to the inquiry was made without discussion with the respective counsel; and if there was objection to method or manner of the answer then was the time to make record on the same and the failure constitutes waiver of the same. In the interest of justice, had there been blatant error this Court might consider it but it finds no error nor abuse of discretion.

R.M. #16: Lacking specificity this Court can really find nothing to discuss or review on this point that has not already been handled or will be in the continuation on B.A. #_____.

As previously noted, this Court attempted to dispose of as many similarities between R.M. #_____ and B.A. #_____ as possible at one time. However, with the specifics mentioned in B.A. #_____, it was felt that those specifics ought to be taken individually where there was not exact duplication.

B.A. #1 thru #8: These are assumed to be background data for the reviewer to keep in mind generally. If there is to be some other import as to merits for a new trial individually, this Court fails to comprehend their significance and dismisses them as without merit. Trial counsel was present and the trial is not noted as delayed by the failure of appearance by any co-trial counsel.

B.A. #13 and #31 and GENERAL: While there can be no doubt that the jury sits as trier of fact and the Court as trier of law, one must keep in mind that evidentiary

matters are as important to the Court as to the jury. It must not only decide what law is applicable (see specificially T.2 P. 579 on skidding charge) but the real potentials of motions for directed verdicts calls for a type of weighing of the evidence so that the Court may rule after most strongly construing it one way or the other. This Court considers it to be the controlling view that, while a Court may not just "take over" the questioning of a witness and produce other or new matters, it may do so in the exercise of its discretion to clarify a statement made. The Court finds no abuse of that discretion when kept in the context of matters found on T.1 P. 44, 45 and 46.

B.A. #14: The Court fails to understand how an objection made and the Court ruling on the same amounts to "misconduct". It is assumed that motionor means "incorrect." Dealing with that assumption, this Court views it to be correctly ruled upon in that the witness said he did not know (T.1 P. 73) and to opinionate that gravel on a road with a gravel berm was there solely from an accident is speculation. This is even more soundly borne out when the reply on T.1 P. 73 was "impact" and then the same witness later places the "impact" at the pole which is located off of the paved area where the gravel was in question about (see T.1 P. 74). To then switch it about to a cause of skidding only leads to more speculation which the Court property ruled on.

B.A. #15: If this Court were called upon to rule on the matter it would censure plaintiff's counsel more than any other.

However, once plaintiff's counsel "opened the door" by the inference in questioning his own witness it properly became a line of inquiry of the opposition. This review can find no Court rulings on T.1 P. 76 or 77 but assumes reference is made to P. 78 and this Court finds them to be proper.

B.A. #16, #17 and #41: This Court shall start with the proposition that for contempt of the Court committed in the presence of the Court, the Court may properly defer its imposition of sanctions or restrictions with hearing on same to a more opportune time. This Court's impression of a more opportune time would not be in the midst of a lengthy trial such as this. Experienced trial counsel knows the evil of any conversation with a juror; not only is prohibition aimed at stopping unscrupulous tactics but also to remove the aura of "buddy-buddy" that could improperly sway a juror in a closely fought issue. To pursue the matter further on the very next day is reprehensible conduct (T.1 P. 175-14). If counsel wishes to reverse its field and state that the conduct of the juror prejudiced his position, his proper course of conduct was to make his motion for mistrial on the record instead of making the matter worse by continuing the contact himself. This Court can find no evidence supporting the contention of B.A. #17 and 41 from the record and even becomes confused since counsel makes some admission of "joking" with the juror (T.1 P. 79-2) himself.

B.A. #19: This Court finds no error in sustaining an objection to words that are not clear as to definition or meaning. Counsel had the option of trying to obtain the witness's definition so that all would know what he meant at some other

point in time, but it apparently chose not to.

B.A. #20: There is no error in stating the basis of an objection. In either event the objection was overruled and the matter remained with the jury (see T.1 P. 175-1 thru 175-9 where Court ruling is found.)

B.A. #21, #22 and #23: There can be no impropriety in the testing of the creditability of any witness and one who holds himself out as an expert is especially open to attack. Objections are not made improper by stating the basis of the objections so that the Court may understand its import. The Court notes a continual practice of leading questions being asked of the witness and when opposing counsel objects in mid-question he does so properly (see T.1 P. 281) and if this upsets the questioner perhaps that questioner ought to properly phrase his questions. Certainly properly laid objections are no basis for error and in the entirety of plages listed this Court finds no harassment being used by objection and the Court quite properly ruled on the same and quite properly remonstrated the questioner in his improper asking of such questions. This Court can find no context to asking of such questions. This Court can find no context to frame "circuslike atmosphere" in from the transcript. Counsel may have found himself confronted with a difficult witness but this then becomes more a matter of his expertise than error to found a motion for new trial on. The Court finds no impropriety on behalf of the trial court herein, but would state that defense counsel's expression of

exasperation (T.1 P. 279) was not in keeping with his professional standards but when in context of when made is not felt to be worthy of remonstration before the jury by the Court. Certainly it was not prejudicial error.

B.A. #24. Only proper cross-examination is noted by this Court, and, if it served to confuse the witness, would wonder if that is not the purpose of good cross-examination. To see one's own witness commit blunders on cross-examination is not a pleasing thing but hardly makes it error.

B.A. #25: The Court notes no impropriety in either the trial court's rulings or the objections on T.1 P. 315 thru 330. This Court agrees that defense counsel was deserving of rebuke by the Court for his comment on T.1 P. 320. At the very least it is an improper way to state an objection regardless of what may have previously occurred to inadvertently cause it to be made. Due to the lapsed time, it is assumed that this writing is the only way to properly chastise defense counsel and the same is now here stated. However, the Court cannot find this is as grounds of such dire circumstances to cause a re-trial of the cases -- no prejudice is found and trusts that counsel's impropriety of words was sufficiently noted by the jurors to, if anything, lower their esteem of him professionally.

B.A. #26: The Court has some problem in understanding the first portion of the point since the person making the statement states she didn't believe the rumors she heard. In any event, the Court afforded the party an opportunity of jury inquiry

and they apparently chose not to. Upon the presentation made to the Court there was no foundation for it to inquire, particularly so in view of the person's own statement of disbelief. The Court has previously disposed of the "Junke statement."

B.A. #27: Even though motionor here only refers to his own summation on P. 333, the Court has reviewed the instances found in the transcript and finds no impropriety. It might well point out to counsel that the impeachment was not as to the defendant (see T.1 P. 80 to 135) as he states but rather to others which were his own witnesses and he was at those times improperly attempting to impeach his own witness.

B.A. #28: Without some showing of substance in this matter the Court has little to rule upon as to error or juror misconduct of sorts to consider that they were not still fair and impartial jurors.

B.A. #29: Starting at T.2 P. #376 all of the matters up to #392 were outside of the presence of the jury and no prejudicial conduct or error is thus noted. The extraneous comments are within the restrictive powers of the Court and how they are to be treated, i.e., castigation, contempt or ignored, is up to the sound discretion of the Court. The Court would note that defense counsel had his fair share of motions and objections overruled, i.e., he dod "do some wrong."

B.A. #30, #32, #33, and #34: In review of these issues in the context they were entirely presented in, this Court finds no impropriety by the Court. Once again

it will be noted that the questioner was confronted with perhaps a difficult witness but as long as the replies are responsive to the line of inquiry the questioner can't be heard to claim that it is error in that he did not get answers that he liked. The Court has the power to regulate lines of inquiry and the further power to regulate to prevent error whether any counsel calls attention to the matter by objection or not. It is only a logical proposition that the Court may correct an erroneous ruling that it makes and it becomes especially proper to do the same immediately rather than waiting and letting the matter "lie in the jury's mind" for a time before he does so -- it is immediately curative. During the course of examination by defendant's counsel the trial court commencing at T. 2 P. #506 thru #517 afforded to such counsel extensive latitude in trying to establish a point and can well appreciate the frustration that such counsel felt; however the rulings were proper on coveture issues and the Court has no foundation to rule upon as to statements by the defendant (there being no record.)

B.A. #35: This Court is unable to find reference point for this issue. It may only assume that deponent felt that the instructions given by the Court (T.2 P. #523) were of such validity that he agreed that his line of inquiry was improper, abandoned the same, instructed the witness to be careful of answers and even proceeded to turn the questioning over to co-counsel (see T.2 P. 525). This Court finds no record to establish any of the further contentions of counsel.

B.A. #36: The Court can find no basis for this allegation or counsel as the record clearly states (even by counsel's own statement) that nothing took place in the presence of the Court or the jury.

B.A. #37: A review of the record appears to substantiate that deponent had just cause to fear his continued course of inquiry of the witness. He was clearly proceeding improperly and was on the verge of creating sound prejudicial error. The Court had consistently advised counsel to avoid criminal case references (properly) but like the moth to the flame, deponent seemed incapable of refraining.

B.A. #38: This Court would note that the point made is disjointed in that the matters covered in all of these pages are not the same. From T.2 P. #540 to #546 this Court can find no error on the part of the court or defense counsel -- the basic problem being the continual leading of the witness and counsel persisting in doing it contrary to the court's proper rulings on same. As to T.2 P. 546 and 547 there is raised the issue of an eleventh hour phone call (see other references at T.2 P. #360, #363-30 and #395). The review shows no improper rulings by the Court on this call and that the call was in the purest hearsay rule. This Court can conceive no method or manner in which the call can be relegated to res gestae exception and permit its entrance. Simply because it may have been close in time does not qualify its placement under the circumstances. More than anything else, it would have been self-serving to the beneficiaries to the action if used to prove the truthfulness of its contents -- even conceeding that point it has no bearing upon the accident event itself. The Court having properly ruled upon the same whenever reference was had

to the same, it was incumbent upon it to rule the way it did at T.2 P. #546 when the issue appeared for the last time at rebuttal by plaintiff.

B.A. #40: This Court notes nothing from the transcript except proper concern by the trial court for a jury that had been involved in a long trial the conclusion of which came at a week-end. The Court notes no objection by plaintiff's counsel on the record. The Court assumes no "rush" was conveyed to the jury since they did not hurry to a verdict but rather returned on the following Monday.

B.A. $42: No specific reference being made by deponent, the Court can only state that it finds no evidence of same from the transcript.

Thus, the Court has covered all of the numbered matters and would otherwise be content to rest. However, with the broadness of the motions the Court feels compelled to touch upon other matters that were stated in the oral arguments and the briefs even though not listed in the formal motions and "affidavits."

The trial court was entirely proper in its rulings upon testimony that plaintiffs attempted to solicit from two former wives of the defendant. The Court feels that Ohio Revised Code Section 2317.02(c) is so plain that no further comment is called for. The privilege belongs to the husband in this instance and nowhere does the record show that he waived the same -- equally important, the defendant never took the stand in his own behalf to even create inferentially any waiver.

It is felt necessary to comment that in several instances plaintiffs are quite right

that certain matters were proper evidentiary issues to bring before the Court. However, when certain objections were made and sustained as to form or phrasing, counsel simply abandoned the matter rather than properly stating a question. Certainly their voluntary abandonment in this nature cannot now be heard as a basis of motion for new trial. Generally the denial of the right to question on the issue was not a flat denial but, rather, a proper denial in the method and manner employed by counsel.

Also, to capsulize an issue raised several times as to a lay person's opinion, the general rule is that ordinarily such a person may not express an opinion unless he had an opportunity to witness or observe the things about which he is called upon to testify. This is an area that must be strictly scrutinized or else the courts will find themselves deluged with instances where the testimony will resolve itself into a situation of "my friends versus your friends" and nothing of real value will be developed. This Court finds no improper restrictions imposed by the trial court on lay persons expressing an opinion when it was material or close in point of time to the incident. To say that if you don't let "ordinary persons" testify as to what is "ordinary" you'll never know what test to apply leads us only to "quantity" evidence and not quality and resolves nothing.

As to witnesses in general (expert and lay), this Court finds when properly examined they were permitted to have their say. The jury's belief or disbelief is their province. Suffice it to say that simply because an expert says it doesn't mean they believed it or had to believe it. Their treatment of it alone gives it status to the "greater weight of the evidence" and because one counsel or the other

says it's true has no bearing. The Court finds there was evidence going both ways on every major issue and can find, once again, no sound basis for the Court to surplant its opinion for that of the jury.

To conclude, it is obvious that this was a most difficult trial for all concerned. Patience was worn thin many times as is apparent from the record. It is, this reviewer trusts, equally obvious that the review itself was long and difficult. Quite possibly the problem of the trial was the same as with this review; a lack of coming to grips with an issue rather than just a broadside blast at the whole thing and flitting about. The disjointed arguments presented at recesses and in-chambers is typical of the problem of coherency noted throughout.

Perhaps this Court devoted too much time and effort in this review, perhaps not. It can only trust that, in its efforts to be complete and exhaustive of all of the points raised, that the matter will come to rest; or, at the very least, make it somewhat more simplified for posterity.

Now, therefore, it is hereby ordered, adjudged and decreed that the motions for new trial and/or judgments notwithstanding the verdicts be found to be without merit and they ought to be, and the same are hereby denied, overruled and dismissed.

This being the judgment of the Court, entry is hereby made and filed in accordance therewith.

This being the Judgment Entry of the Court, the Clerk is hereby ordered to enter the same upon the Journal of the Court.

/s/ Robert C. Gibson
JUDGE

MJ-28-36

THE SUPREME COURT OF THE STATE OF OHIO

CA-7826
CP-73-1130

THE STATE OF OHIO, 1975 TERM

City of Columbus. To wit July 23 1975

Miranda Nealy et al.,
Appellants,

vs. No. 75-365

Renee L. Wingard et al., MANDATE
Appelees.

To the Honorable COMMON PLEAS COURT
Within and for the County of LUCAS,
Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals reversed on authority of Primes v. Tyler (No. 75-61) 43 Ohio St. 2d 195.

FILED
COURT OF APPEALS
AUG 8 1975
LUCAS COUNTY, OHIO
Carol A. Pietrykowski, Clerk

THOMAS L. STARTZMAN,
Clerk

....AUG 7-1975.....19...

.....

Sam F. Adkins.....deputy

RECORD OF COSTS

Docket Fee.....$20.00. Paid by..Cubbon& Goldberg..

COURT OF APPEALS OF OHIO, SIXTH DISTRICT

COUNTY OF LUCAS

C. A. NO. 7826

Miranda Nealy, et al., APPEAL FROM

Common Pleas COURT

APPELLANTS NO. 73-1130

-VS- DECISION & JOURNAL ENTRY

Rene L. Wingard, et al.

APPELLEES

DATE February 28, 1975

This cause came on to be heard upon the record in the trial court. Each assignment of error was reviewed by the court and upon review the following disposition made:

This case is a personal injury case based upon negligence and the interpretation of the Ohio Guest Statute. The court directed a verdict on behalf of both defendants upon the opening statement of plaintiffs' counsel and entered judgment on behalf of the defendants. It is from this judgment that appeal was taken.

Counsel for plaintiffs-appellants, in his opening statement, indicated that defendant-appellee, Rene Wingard, was an agent for the defendant-appellee, Gladys Herron, d/b/a/ Herron Beauty School; that Rene was negligent; that her negligence was the proximate cause of the injuries and damages suffered by the plaintiffs-appellants and, finally, that the plaintiff-appellant, Miranda Nealy, was not a guest in the car driven by Rene Wingard within the meaning of the Ohio Guest Statute. Counsel, in his factual statement, indicated that Miranda Nealy was injured in an automobile accident in an auto-mobile operated by Rene Wingard, and that Miranda Nealy and Rene Wingard were fellow students at the Herron Beauty School operated by defendant, Gladys Herron. The opening statement further indicated that there was to be a demonstration at a Unity Beauty Supply Company located some distance from the Herron Beauty School, and that the students, either nine or ten in number, indicated a desire to attend the hair-coloring demonstration, which was optional in regard to attendance. Defendant, Gladys Herron, did indicate that transportation would be furnished to the Unity Beauty Supply

Company. The students were to report to the Herron Beauty School and did so; thereafter, following a short lecture by their teacher, Joyce Miles, the students were made aware that there were only two cars available for transportation, one belonging to Joyce Miles and the other to Rene Wingard. Joyce Miles, the teacher, drover her car and Rene Wingard indicated that she would drive her car over to the Beauty Supply Company where the demonstration was to be given. Joyce Miles' car filled up first, and the plaintiff, Miranda Nealy, occupied the automobile of the defendant, Rene Wingard, On the way to the Beauty Supply Company Rene Wingard lost control of her car and the plaintiff, Miranda Nealy, was injured.

After the motion for directed verdict was made on the opening statement, and discussion thereon by counsel and the court, counsel for plaintiff made one addition to his opening statement to the effect that Miranda Nealy, plaintiff, would testify that if they (she and Rene Wingard) attended such seminar, they kept building their hours toward graduation. If they did not attend them, then there would be no school, and they would have to make it up at a later date.

Upon examination of the opening statement, we find no factual statement that would support a conclusion that there was any agency relationship between the defendant Wingard and the co-defendant Herron; we further find that the plaintiff Miranda Nealy was a guest rather than a passenger within the meaning of the Ohio Guest Statute, as construed by the various courts of the State of Ohio, including the Supreme Court. We further find that the fact that the driver and the passenger were students expecting to attend

the same lecture was not sufficient to constitute a joint enterprise that would take the case out of the Ohio Guest Statute. We find that the assignment of error, to wit:

> "The trial court erred in directing a verdict for the Defendants-Appellees after Plaintiffs-Appellants opening statement when in said opening statement counsel for the Plaintiffs-Appellants stated a prima-facia (sic) case against both of the defendants."

is found not well taken. Duncan v. Hutchinson, 139 Ohio St. 185; Hasbrook v. Wingate, 152 Ohio St. 50, Syl. 4; Stiltner v. Bahmer, 10 Ohio St. 2d. 216, Syl. 5; Cf. Burrow v. Porterfield, 171 Ohio St. 28 at page 36; Dorn, Admr. v. Village of North Olmstead, 133 Ohio St. 375; Vest v. Kramer, 158 Ohio St. 78; 15 O. Jur. 2d. 674, Secs. 153 et seq.

On consideration whereof, the court finds that substantial justice has been done the party complaining and judgment of the Lucas County Common Pleas Court is affirmed. Costs assessed against appellant. Cause remanded to said court for execution of judgment and for costs.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Ten (10) days from the date hereof this document shall constitute the journal entry of judgment and shall be file-stamped by the Clerk of the Court of Appeals, at which time the period

for review will begin to run. App. R. 22(E).

Clifford F. Brown, P.J.

Frank W. Wiley and

John W. Potter, JJ.,
concur.

Presiding Judge
/s/ Clifford F. Brown
Judge

/s/ Frank W. Wiley
Judge

/s/ John W. Potter

IN THE COURT OF APPEALS OF LUCAS COUNTY

Andrea Thompson
APPELLANT
-vs-
Dean L. Wilson, etc.,
APPELLEE

COURT OF APPEALS
NO. 7693

TRIAL COURT NO.
73-1942

DECISION &
JOURNAL ENTRY

DATE August 8, 1975

FILED
COURT OF APPEALS
AUG 8 1975
LUCAS COUNTY, OHIO
Carol A Pietrykowski, Clerk

FILED
COURT OF APPEALS
AUG 18 1975
LUCAS COUNTY, OHIO
Carol L Pietrykowski,
Clerk

Appellant's assignment of error as follows:

"I: SECTION 4515.02 OF THE OHIO REVISED CODE, COMMONLY REFERRED TO AS 'GUEST STATUTE' IS UNCONSTITUTIONAL AS A VIOLATION OF THE EQUAL PROTECTION GUARANTEES OF THE OHIO AND UNITED STATES CONSTITUTIONS.",

is found well taken on authority of Primes vs. Tyler (1975), 43 Ohio St. 2d. 195 and Nealy vs. Wingard, 75-365, Ohio Bar XLVIII, No. 30, July 28, 1975, p. 1074.

Judgment of the Court of Common Pleas of Lucas County is reversed and cause remanded

for further proceedings according to law. Costs to abide final determination.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Ten (10) days from the date hereof this document shall constitute the journal entry of judgment and shall be file-stamped by the Clerk of the Court of Appeals, at which time the period for review will begin to ren. App. R. 22 (E).

Clifford F. Brown, P.J., Frank W. Wiley and John W. Potter, JJ., concur.

Clifford F. Brown
Presiding Judge

Frank W. Wiley
Judge

John W. Potter
Judge

IN THE COMMON PLEAS COURT OF LUCAS COUNTY OHIO

Thompson

Plaintiff

vs

Wilson

Defendant

No, 73-1942

JOURNAL ENTRY

Upon consideration of the pleadings, the oral

arguments and briefs of counsel the Court finds that the guest statute of the State of Ohio prohibits the plaintiff from recovering in this case under the facts stated in the pleadings. There being no genuine issue of material fact, the Court finds that defendant is entitled to judgment as a matter of law. Defendant's motion for summary judgment is therefore well taken. It is therefore ordered adjusted and dereased that judgment is hereby rendered in favor of the defendant with prejudice at plaintiff's costs.

Robert V. Franklin
Judge

Approved:

IN THE

Supreme Court of the United States

May Term, 1976

No. 75-1679

PENA NENOFF, ANCILLARY ADMINISTRATRIX OF THE ESTATE OF NENO S. NENOFF, DECEASED,

Petitioner,

vs.

GEORGE M. THOMPSON,

Respondent.

On Appeal From The Final Order Of The Supreme Court Of The State Of Ohio, Dismissing An Appeal Of The Judgment Of The Court Of Appeals For Lucas County, State Of Ohio.

[PURSUANT TO 28 U.S.C. SECTION 1257 (2)]

JURISDICTIONAL STATEMENT OF RESPONDENT

James R. Jeffery
935 National Bank Building
Toledo, Ohio 43604
Attorneys for Respondent.

SPENGLER, NATHANSON, HEYMAN, MCCARTHY & DURFEE,
Of Counsel

INDEX

CITATIONS

INTRODUCTION

Respondent submits this brief to clarify the factual statement of petitioner. This petition is taken from a Judgment and Opinion of the Sixth Appellate District of Ohio and not the Ohio Supreme Court. The latter court denied petitioner's appeal as a matter of right holding that no substantial constitutional question exists and overruled petitioner's motion to certify. It is respectfully submitted that this case does not qualify for review under a Writ of Certiorari by the Supreme Court of the United States.

A. *JURISDICTION*

Petitioner is attempting to invoke jurisdiction of the United States Supreme Court for the purpose of claiming that Section 4515.02, *Ohio Revised Code,* held unconstitutional by the Supreme Court of Ohio in the case of *Primes vs. Tyler,* 43 O.S. 2d, 195; 331 N.E. 2d 723 (1975), is in conflict with provisions of the federal and state constitutions. This Petition is based upon a question that is moot.

B. *STATEMENT OF THE CASE*

This case concerns a traffic accident that occurred September 19, 1967. It was tried to a jury in the Common Pleas Court of Lucas County, Ohio, which returned a verdict for the defendant-respondent on May 26, 1970. Judgment was entered upon the verdict and the state court trial judge, Nicholas J. Walinski, was appointed Judge of the United States District Court for the Northern District of Ohio. A motion for new trial was denied by Common Pleas Judge Robert L. Gilson. It took several years for a transcript of the trial to be furnished Judge Gilson, whose decision was filed October 9, 1974 (Petitioner's Appendix A34-62). An appeal was then taken to the Court of Appeals for the Sixth District, and the alleged assignments of error denied on all counts (A.17-24). A motion to reconsider was also filed and denied. (A.25-33) Notice of Appeal was thereupon filed in the Supreme Court of Ohio and the appeal and Motion to Certify denied. (A.1-4).

Petitioner filed this suit claiming wrongful death and survival damages. The Petition alleged that the decedent was a passenger in a motor vehicle being operated by respondent, but at trial no admissible evidence was presented to alter the fact that the decedent was a guest of respondent at the time of the accident.

Petitioner elected to try this law suit under a theory of willful or wanton misconduct. At the close of the evidence, petitioner submitted eight special instructions for the court to give the jury, which dealt expressly on the liability issues of the case. Petitioner's special instruction 2-A and B discussed the requirements for a finding of wanton misconduct and special instruction 8 directed the jury on the issue of exemplary damages if the jury found the respondent guilty of wanton misconduct. Petitioner's special instruction number 7 concerned the affirmative defense of Assumption of Risk, and discussed the circumstances of that defense.

Thereafter, following arguments by both sides, the court instructed the jury generally on the issues of willful or wanton misconduct and assumption of risk, to which no objection was made by petitioner nor any suggestion by petitioner or request that the court charge on the issue of negligence instead of willful or wanton misconduct.

The traffic accident, the subject of this suit, occurred on the Front Street exit ramp going left off the Craig Memorial Bridge in Toledo, Ohio. The Front Street exit presents two courses to a motorist going south over the bridge, a gradual 9 degree ramp to the right for traffic intending to go west on Front Street, and a severe 22 plus degree curve to the left for traffic going east on Front Street.

Respondent had been accustomed to taking the right gradual Front Street ramp as he drove it 5 or 6 times a day to his place of business in East Toledo. He was not familiar with the left ramp. however, only having taken it 4 to 8 times in the past 5 years.

In the middle of the Craig Memorial Bridge is a 50 M.P.H. sign

and the Front Street exit is just past the south end of the bridge. There are no signs in the exit providing a speed limit or otherwise warning motorists of the sharp curve ahead. The ramp goes downhill, over a bridge, and then into the curve.

On the afternoon of September 19, 1967, respondent had been at his bar restocking and performing other such chores for the evening trade. He had had lunch that day at the bar operated by the petitioner. Up to the middle of the afternoon he had had no alcoholic beverages, but from then to 6:00 P.M. he had 4 drinks consisting of one shot of gin in a tall glass with soda. Witnesses testified respondent was not under the influence of alcohol when they were with him just before the accident occurred. Respondent sustained a head injury in the accident for which he was treated at the hospital.

Shortly after 5:00 P.M., Neno Nenoff, the decedent, came into respondent's bar and had a drink. Then, about 6:00 P.M., Mr. Nenoff and respondent left the bar and respondent drove his own car intending to drive Mr. Nenoff and himself to Packo's, a restaurant on Front Street east of the Craig Memorial Bridge, intending to eat dinner. They drove into downtown Toledo, past a restaurant called "Jim Feak's", (Mr. Nenoff wanted to see it) then out Summit Street and across the bridge.

Respondent drove across the bridge with the flow of traffic, a 50 M.P.H. posted speed zone. He was not familiar with the curve to the east and assumed it was similar to the one going west until he was into it, lost control of his car and hit a light pole. Upon impact, Mr. Nenoff, who was sitting in the right front seat, was thrown out of the car and his head struck the pole. He remained unconscious for a period of approximately two hours, and then died of his injuries.

Different witnesses from direct observation to expert calculation, placed respondent's speed into the curve at approximately 50 to 60 M.P.H. Respondent testified his speed was 45 to 50 M.P.H. at the curve. Mary Ann Frederick, an eye witness, estimated respondent's speed at 60 M.P.H., give or take, at the ramp. It

should be noted here that her estimate came after 5 or 6 trips to the ramp with John Rust, petitioner's counsel, and his discussions with her of speed.

At the commencement of trial, respondent made a motion for the separation of witnesses, and it was granted. John Rust, petitioner's counsel, requested Pauline Nenoff, decedent's wife, to leave the courtroom pursuant to the court's ruling. No objection was made to her leaving and no proffer was made of any reason why her absence until her testimony was presented would prejudice the petitioner's case.

Later, after her testimony, Pauline Nenoff was instructed to leave the courtroom by Kelsey Bartlett, another of petitioner's counsel, as she was intended to testify again as a rebuttal witness. The exchange between the court and Mr. Bartlett was as follows:

The Court: That is all, Mrs. Nenoff, thank you. You may step down.
Do you want the witness to remain in the courtroom or not?

Mr. Bartlett: The witness should remain out of the courtroom. We may need her for rebuttal purposes.

Never, at any point in the trial, did petitioner make any objection or specifically request that Pauline Nenoff or the children sit at counsel table with Pena Nenoff, the decedent's mother and the fiduciary of his estate as well as the petitioner's plaintiff in the case.

1. *WHERE A PARTY IN TRIAL REQUESTS AND THE COURT GIVES TO THE JURY SPECIAL INSTRUCTIONS OF LAW, AND THE JURY RETURNS A VERDICT AGAINST THAT PARTY, HE CANNOT ASSIGN AS ERROR UPON APPEAL THE TRIAL COURT'S INSTRUCTIONS HE REQUESTED.*

This case was tried in May of 1970, and at that time Section

2321.03, *Ohio Revised Code,* was in effect and provided that error can be predicated upon erroneous statements contained in the charge, *not induced by the complaining party,* without exception being taken to the charge (emphasis ours). Since July of 1971, the new Ohio Rules of Civil Procedure provide that no party may assign as error the giving or failure to give any instruction unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Rule 51 (A), Ohio Rules of Civil Procedure. Ohio case law has been consistent and the Supreme Court definitive, and careful to hold that an error of commission in the charge by the court to the jury may be the subject of appellate review without an objection, so long as the charge complained of was not induced by the complaining party. *Carrothers vs. Hunter,* 23 O.S. 2d, 99; 52 O.O. 2d, 392. A very clear analysis of the situation here was made by The Ohio Supreme Court in the case of *Hasapes vs. Drake,* 24 O.S. 2d 1; 53 O.O. 2d, 1, in which that court declared:

> "* * *, a special instruction, requested by appellant and given by the court, contains the principle of law which appellant now asserts to be erroneous. Although we are sensitive to the fact that trial tactics often change during the course of the trial, a trial court cannot be placed in a position of having to choose between a party's inconsistent positions. If the reason for this change in plaintiff's position was shown in the record, and the request for the instruction withdrawn, perhaps a reviewing court would know which path the litigant elected to follow. Plaintiff's mere exceptance to his own requested instruction does not remove the badge of inducement which served to precipitate the error. Section 2321.03, Revised Code, provides, in part, that 'error can be predicated upon erroneous statements contained in the charge, not induced, by the complaining party * *'. See Carrothers vs. Hunter (1970), 23 Ohio St. (2d) 99, 52 O.O. (2d) 392; Rhoades vs. Cleveland (1952), 157 Ohio St. 107, 47 O.O. 91; State vs. Tudor (1950), 154 Ohio St. 249, 43 O.O. 130. Under the circumstances, appellant's request for the instruction amounts to an inducement by appellant to the court to make the charge complained of, foreclosing appellate review of the assigned error." 53 O.S. 2d, at p. 3.

Although the distinction has been made in alleged errors of commission, as opposed to errors of omission, it has generally been held that a complaining party must object to an error of omission in a charge of the trial court to the jury before it can be considered as a claimed error on appeal. *Rhoades vs. Cleveland,* 157 O.S. 107; 47 O.O. 91. If the claimed error of the trial court here was omitting to charge the jury on the question of negligence, then petitioner had the obligation to object or bring to the attention of the trial court the charge omitted. Nowhere in the record of the case at bar did the petitioner request of the trial court a charge to the jury on negligence, nor was any submitted by the petitioner as a special instruction or other such request.

If the petitioner is now claiming error of commission to the effect that the trial court committed error in instructing the jury on the issue of willful or wanton misconduct, the trial court was induced to charge by the petitioner's own conduct. As stated, petitioner chose to try this case with an effort to obtain exemplary damages for alleged willful or wanton misconduct, and submitted to the trial court special instructions on the subject of liability which the trial court approved and gave to the jury. Petitioner, after the jury has returned a verdict against her, is claiming error in the court's charge on liability, which was given to the jury at petitioner's request. This cannot be done.

To hold otherwise would be to establish precedent for the practice of a party electing to submit an instruction to the court to give to the jury and then, having had an adverse jury verdict against it, claim error in the precise instruction requested. Petitioner here had no concern regarding a charge on the issue of negligence as the record clearly shows.

The Ohio authorities clearly support respondent's proposition on this point 3 0. Jur. 2d, *App. Review*, Section 185, discusses the matter as follows:

"A reviewing court in appeals on questions of law will only

consider such errors in a lower court as were preserved by objection, ruling, or otherwise, in that court. The law imposes upon every litigant the duty of vigilance in the trial of a case and where the trial court commits an error to his prejudice, he is required then and there to call the attention of the court to that error. A just regard to the fair administration of justice requires that an opportunity should be given the court to avoid the commission of error upon trial, and that when an error is supposed to have been committed, there should be an opportunity to correct it at once, before it has had any consequences."

"The law does not permit the party to lie by, without stating the grounds of his objection, to take the chances of success on the grounds in which the judge has placed the cause, and then, if he fails, avail himself of an objection in which, if it had been stated, might have been removed."

* * * * *

"The well-settled general rule that one cannot urge for the first time on appeal objections which could have been obviated if they had been made below, is based largely upon a kind of estoppel, since the party who fails to raise an objection in the lower court, which might have been there corrected should not be allowed to wait until the cause comes before the reviewing court."

A few of the many cases that support this proposition are as follows: *Younger vs. Halliday,* 107 O.S. 432 (1923), where the court held that it was too late after trial to complain initially that the original petition was not sufficient to admit the evidence introduced on trial without an objection to that at the trial. This case and very similar language was cited in *Coffee vs. Shank,* 68 O.O. 2d, 356 (1974); in *Indian Hill vs. Atkins,* 57 O.L.A. 210 (1949) the court said that since the appellant had cited no point in a trial record where the issue had been raised there was therefore no error in the trial court for ignoring that issue; in *Univis vs. Kaplan,* 55 O.L.A. 243 (1949) the court held that where there was no claim of inconvenience or lack of time at the trial, the party claiming this error could not raise that issue on appeal. Petitioner's request for the special

instructions and the court's granting and reading them to the jury induced the court to make an alleged error upon which the petitioner now chooses to base this appeal. The petitioner is foreclosed from making this assigned error. *Hasapes vs. Drake, Supra.* A party cannot lie by, take the chances of success on one ground, and then upon failure object. *State vs. Childs,* 14 O.S. 2d 56; *State vs. Glaros,* 170 O.S. 471.

It has been recently asserted in *State vs. Morris,* 42 O.S. 2d 307, that it is a general rule that an appellate court will not consider any error which could have been called to the trial court's attention at a time when such error could have been avoided or corrected. That was not done here.

It should also be noted that petitioner never questioned the constitutionality of the "guest statute" and, as such, it is waived. *Cuthbertson vs. State,* 106 O.S. 658; *Village of Clarington vs. Althar,* 122 O.S. 608; *State vs. Webber,* 163 O.S. 598; *Columbus vs. Ewing,* 77 O.L.A. 31; *City of Toledo vs. Gfell,* 107 O.A. 93.

Similarly, no objection was made by petitioner to the fact that the general charge instructed the jury on the issues of willful and wanton misconduct, as also charged upon petitioner's request in Special Instructions, and there was no request for the court to charge on the issue of negligence.

Petitioner's claimed Proposition of Law I is improper since it provides that a party need make no timely objection as to the constitutionality of a statute. This is simply not true. The case of *Primes vs. Tyler,* 43 O.S. 2d 195, is not controlling here because of the election of the petitioner to try this case on the issue of willful and wanton misconduct and submit Special Instructions on those subjects which were given to the jury.

2. ***ERROR IN THE CHARGE OF THE TRIAL COURT DEALING EXCLUSIVELY WITH ONE OF TWO OR MORE COMPLETE AND INDEPENDENT ISSUES REQUIRED***

TO BE PRESENTED TO A JURY IN A CIVIL ACTION WILL BE DISREGARDED, IF THE CHARGE IN RESPECT TO ANOTHER INDEPENDENT ISSUE WHICH WILL SUPPORT THE VERDICT OF THE JURY IS FREE FROM PREJUDICIAL ERROR, UNLESS IT IS DISCLOSED BY INTERROGATORIES, OR OTHERWISE, THAT THE VERDICT IS IN FACT BASED UPON THE ISSUE TO WHICH THE ERRONEOUS INSTRUCTION RELATED.

If the petitioner were assumed correct, for sake of argument, in citing error in the trial court's instruction on willful and wanton misconduct, the "two-issue rule" applied to this case affirms the jury's verdict. The two-issue rule as stated above is that error in the charge of the court dealing exclusively with one of two or more complete and independent issues required to be presented to a jury in a civil action will be disregarded, if the charge in respect to another independent issue which will support the verdict of the jury is free from prejudicial error, unless it is disclosed by interrogatories, or otherwise, that the verdict is in fact based upon the issue to which the erroneous instruction related. *Bush, Admr. vs. Harvey Transfer Co.,* 146 O.S. 657; *Martinez vs. Corcino,* 4 O. App. 2d 408, 33 O.O. 2d 499.

In the case at bar, this rule applies to the defense of assumption of risk. The jury returned a general verdict for the defendant-respondent. There were no interrogatories submitted or special verdict requested. Petitioner agreed that the defense of assumption of risk of decedent was a proper issue for jury determination, never having objected to the court's instruction on it and even submitting a special instruction of her own on it which was accepted by the court and read to the jury.

The case of *Weaver vs. Hicks,* 11 O.S. 2d 230, 40 O.O. 2d 203, presents a lengthy discussion concerning the availability of assumption of risk as opposed to contributory negligence, in defense of a claim of willful or wanton misconduct. The court distinguished between contributory negligence and assumption of risk and held

that willful and wanton misconduct may obviate a defense of contributory negligence, but assumption of risk was still a defense against willful or wanton misconduct.

The court held in syllabus 1 as follows:

> "1. The defense of assumption of the risk is available to a defendant where a plaintiff consents to or acquiesces in an appreciated, known or obvious risk to the safety of the plaintiff, even where willful and wanton misconduct on the part of the defendant may be proved."

See also *Clos vs. Bauer*, 34 O.O. 2d 213, and *Gill vs. Arthur*, 24 O.O. 138.

In the case at bar, decedent and respondent had been drinking together before they left the bar, intending to go to a restaurant for dinner. They had driven together to downtown Toledo, respondent showing decedent where Jim Feak's Restaurant was located, then out Summit Street and across the Craig Memorial Bridge. There is no evidence, circumstantial or otherwise, to even hint that decedent complained of respondent's driving and asked to get out of the car.

If the jury looked at respondent's conduct as related to the accident and concluded that he was guilty of willful or wanton misconduct, the same facts would also support their further conclusion that decedent, by his own conduct, assumed the risk of the injuries he sustained at such time and place. This would require the jury to return a verdict for the defendant-respondent, as the jury did.

That petitioner also claims error now in the court's charge of willful and wanton misconduct is irrelevant since it was not done at trial; and, further, petitioner submitted to the court a Special Instruction on assumption of risk of the injuries he sustained in the accident, thus acknowledged at trial by all to be an issue for jury determination. That issue alone justifies the jury's verdict regardless of any question of the propriety of the trial court instructing on willful and wanton misconduct.

3. *IN A WRONGFUL DEATH ACTION, IT IS WITHIN THE DISCRETION OF THE TRIAL COURT TO PERMIT A WIDOW AND HER CHILDREN BENEFICIARIES TO SIT WITHIN THE BAR OR AT COUNSEL TABLE WHEN THEY ARE REPRESENTED BY ANOTHER WHO IS NOMINAL PARTY PLAINTIFF AND FIDUCIARY OF THE DECEDENT'S ESTATE.*

It is well settled upon the authorities cited before that claimed errors which arise during the course of a trial which are not brought to the attention of the court by objection or otherwise, are waived and may not be raised upon appeal.

Neither Pauline Nenoff nor the children were competent to testify concerning the auto accident or circumstances leading to it, as they were in Flint, Michigan at the time, the accident occurring in Toledo. Their testimony had only to do with the damages aspect of the case. There is no hint that petitioner's counsel was hindered, let alone prejudiced, by the absence at the trial table of them. In fact, after their testimony, they sat in the courtroom with counsel, with no objection of respondent.

Even though it is respectfully submitted that Petitioner's Proposition of Law is improper, the issue was not properly raised in the trial court and therefore should not be permitted to be raised on appeal.

Regardless, it has always been the law in Ohio that it is within the discretion of the trial court to permit a widow and her children beneficiaries represented by a nominal plaintiff to sit within the bar or counsel table and within view of the jury during the trial. *Cincinnati, etc. vs. Stanislaus,* 13 O.C.C. N.S. 260, affd. 83 O.S. 477. 52 O. Jur. 2d, *Trials,* Section 45. In the case of *Long, Admr. vs. Maxwell Co.,* 24 O.O. 2d 446, a survival-wrongful death case, the decedent was the father of three children, leaving them and a wife surviving. The wife was the fiduciary of his estate. The trial court excluded the children from the courtroom except for a brief

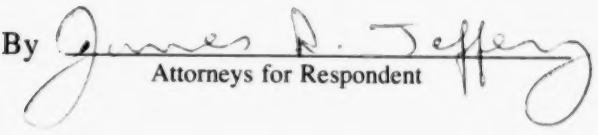
appearance before the jury, and this was cited as error. The Court of Appeals affirmed the trial court holding that the children, along with their mother the executrix, were in the anomalous position of being most interested in a judgment, yet the children were not actual parties to the action. The children had a right to appear at trial and be viewed by the court and jury. But the discretion of the trial court excluding them otherwise must be upheld. *Long* was not a case where beneficiaries were excluded from any appearance or participation at trial, and neither is the case at bar.

Petitioner, for reasons outside the control of the trial court or respondent, is the mother of the decedent, not his wife. The mother was chosen as plaintiff for trial and the representative of the widow and children of deceased. The mother sat throughout and participated in the trial from beginning to end. The wife and children all testified before the jury and sat in the courtroom after their testimony, the wife sitting at counsel table. There is no complaint, nor record of any sort, that petitioner's counsel needed Pauline Nenoff for consultation during other testimony and, indeed, she could have no first hand knowledge of the auto accident involved. It is respectfully submitted, no matter how hard petitioner attempts to confuse the concept of a ''party'', that petitioner made no record at trial upon which this claimed error can be based, and the procedure followed at trial was proper and a correct exercise of the discretion of the trial court.

CONCLUSION

It is respectfully submitted that this case has had a full appeal and is not a proper subject for review by the United States Supreme Court. Petitioner's claim that this Court take jurisdiction should be overruled.

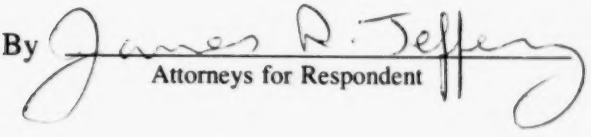
SPENGLER, NATHANSON, HEYMAN,
McCARTHY & DURFEE

By 
Attorneys for Respondent

CERTIFICATION

This is to certify that on the 16th day of June, 1976, a copy of the foregoing Brief was sent by United States mail to John G. Rust, Esq., attorney for petitioner, at 833 Security Building, Toledo, Ohio 43604.

SPENGLER, NATHANSON, HEYMAN,
McCARTHY & DURFEE

By 
Attorneys for Respondent

No. 75-1679

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

PENA NENOFF, ANCILLARY ADMINISTRATRIX OF THE ESTATE OF NENO S. NENOFF, DECEASED,

Petitioner,

v.

GEORGE M. THOMPSON,

Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

John G. Rust
833 Security Bldg.
Toledo, Ohio 43604
(419) 243-9191

Attorney for Petitioner

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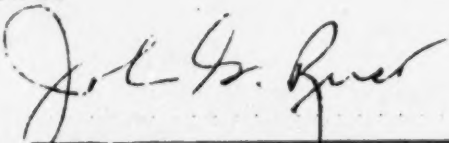
APPENDIX: AND CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

2 Copies of this Reply Brief have been served forthwith upon Respondent's Attorney Mr. James R. Jeffery, 934 National Bank Building, Toledo, Ohio, 43604.



John G. Rust
Attorney for Petitioners

CITATIONS

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RESPONDENT.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE OHIO SUPREME COURT.

In view of the scope, seriousness, and number of Respondent's misleading statements and arguments of the Record, and also to Answer certain Arguments first raised by Respondent, Petitioners

file their Reply brief herein. Petitioners naturally and understandably are interested in their cause being determined upon an accurate understanding of the Record, and we believe that this Brief will be of help to this Court in carrying out also its desire to proceed without misunderstanding.

Respondent's actions upon analysis are indeed paradoxical. Respondent successfully induced the Trial Court to grant his Motion to Limit Plaintiffs to recovery only if Wanton and Wilful misconduct were proved because of the Ohio Guest Act; and also Respondent successfully moved the Trial Court for a Separation of Witnesses so as to exclude surviving spouse Pauline Nenoff and children except when testifying. The Trial Court so ordered.

Now the Respondent, contrary to the Record, claims that because the Trial Court did just what Respondent asked the Trial Court to do, that Petitioners "induced" such errors, and, therefore, can't attack the constitution-

ality of such actions.

At the time of the trial when the Trial Court granted Respondent's Motions, the parties were governed by Ohio Revised Code 2321.03 which provided as follows:

> "2321.02 Exception not necessary (GC 11560) An exception is not necessary, at any stage or step of the case or matter, to lay a foundation for review whenever a matter has been called to the attention of the Court by objection, motion, or otherwise and the court has ruled thereon. Error can be predicated upon erroneous statements contained in the charge, not induced by the complaining party, without exception being taken to the charge. Laws of Ohio, Vol. 116 at page 115."

Respondent's contentions seem to admit that the record shows that the Trial Court did grant Respondent's motions, but Respondent seems to argue that somehow Petitioners "induced" the Trial Court to grant Respondent's motions, and somehow "waived" the constitutional errors. Such simply neither is or was the case, and the Record clearly shows the errors are preserved.

STATEMENT OF THE CASE

B. ON RESPONDENT'S MOTION, AND OVER PETITIONER"S

OBJECTIONS, THE TRIAL COURT RULED PETITIONERS COULD NOT RECOVER BY MERELY PROVING NEGLIGENCE, BUT TO RECOVER, PETITIONERS WERE RULED BY THE TRIAL COURT TO HAVE TO PROVE WANTON MISCONDUCT.

CLEARLY THE RECORD SHOWS PETITIONERS DID NOT AT ANY TIME "INDUCE" THE TRIAL COURT TO RULE PETITIONERS COULD ONLY RECOVER BY PROVING WANTON MISCONDUCT.

The record shows the argument on Respondent's motion for a direct verdict that there could be no recovery for mere negligence, due to the Ohio Guest Statute, was hotly contested by Petitioners. The Record, as shown on page 10 of Petitioner's Petition filed herein, and also in the Record in part as follows at page 394 of the Transcript of the Evidence shows this:

> "THE COURT: The law is clear that before you can show that a man is a passenger for hire, to take him out of the wilfull and wanton, you've got to show a prior agreement to travel for hire, which makes a driver a common carrier and removes the wilfull and wanton. Now there is no evidence of a prior agreement between George Thompson and the decedent, or that he was in the car for the sole benefit of Mr. Thompson.
>
> Therefore, as a matter of law I am going

to rule this is strictly a guest case and the standard has to be wilfull and wanton.

MR. BARTLETT: We object. I had not finished giving the rest of the argument, Your Honor.

THE COURT: Go ahead and put it on the record, but from your own statement at that point there is no question. As a matter of law, he is a guest."
(underscoring ours)

PETITIONER DID NOT REQUEST ANY SPECIAL INSTRUCTIONS IN THE WRONGFUL DEATH WHICH SAID IF THE JURY FOUND WANTON MISCONDUCT, PETITIONERS COULD RECOVER. PETITIONERS INSTRUCTIONS AS TO WANTON MISCONDUCT WERE DEFINITIONS.

The Trial Court's comments, Transcript page 559, and the Special Instructions, Transcript Page 563-1 et seq. are given in the Appendix herein at pages 1-9. Petitioner had requested Special Instructions 1 through 8. Respondent, requested Special Instruction 9, which was given, over Petitioner's objection.

Here, the status and posture of Petitioner's burdens and requests were that, yes, due to then Ohio Guest Act and the Trial Court's granting Respondent's motion for a directed

verdict on the issue of negligence, Petitioners could not recover, except by proving wanton or wilful. Since the Ohio Guest Act has been declared by the Ohio Supreme Court to be invalid by the Ohio and United States Constitutions, Petitioners were subjected to an unconstitutional barrier to recovery, and were prejudiced thereby. Petitioners did not attack the unconstitutionality of the Ohio Guest Act, because it would have been futile then to have done so, but did attack it in the Lucas County Court of Appeals, once an appeal was taken there, which was after grounds for so doing appeared on the judicial horizon.

Petitioner had no alternative but to face the Ohio Guest Act, and merely sought by requesting Special Instructions, and by Petitioner's request after the General Instructions to the jury, to cause wanton misconduct to be defined according to law, for all proper purposes for which it was to be used.

Petitioner did request Special Instruction 2 A, Transcript Page 563-2, and Page 3 of

Appendix herein, and Petitioners did request Special Instruction 2 B, Transcript Page 563-3, Appendix herein Page 4 , but neither of these were anything more than definitions of wanton misconduct. Petitioner did not ask the Trial Court to allow recovery only if wanton misconduct were proved, but Respondent "induced" the Trial Court so to rule.

First of all, this Court should declare all the rules which govern denials of Constitutional rights. What constitutes waiver or loss of a right to claim a right by the U.S. Constitution is, and should be, determined by this Court.

Here, it's believed helpful to this Court to discuss Carrothers vs. Hunter, (1970) 23 Ohio St. 2d 99, which will show that all errors and points relied upon by Petitioners here in this Petition for Certiorari, were preserved under Ohio Law. In Carrothers v. Hunter, supra, the plaintiff's lawyer relied

on the Court's statement of what the law was, and did not object to an instruction. But, when it was later found in the Court of Appeals that the instruction was contrary to law, he was allowed to assert it as error, although in effect he had agreed to it below - because he had not "induced" the error.

The syllabus by the Court is as follows:

> "1. The word induce is commonly understood to mean to lead on, prevail upon or to move a party by persuasion or influence, and generally connotes the use of persuasion or influence by a party upon another to effect a result."
>
> 2. Where there are errors of commission in the charge of a court to the jury, not induced by the complainting party, a failure to object thereto does not constitute a waiver of the error, and such error may be proper grounds for an appeal. (Simko v. Miller, 133 OhioSt. 345, 10 O.O. 535, paragraph three of the syllabus; Rosenberry v. Chumney, 171 Ohio st. 48, 12 O.O. (2d) 56; and State v. Lynn, 5 OhioSt. (2d) 106, 34 O.O. (2d) 226, paragraph four of the syllabus; followed."

That mere acquiescence or agreement with the Trial Court does not prevent one from asserting a point as error is shown by the Court's opinion, which in 23 OhioSt. 2d at

page 101 reads as follows:

"HEREBERT, J. The record in this case clearly shows that the giving of the charge by the trial judge, in response to the question asked by the jury, was based upon the judge's and counsels' belief that the law contained in the charge was correct. Kohn v. B.F. Goodrich Co. (1941), 139 OhioSt. 141, 22 O.O. 127, 38 N.E.(2d) 592. It is undisputed that counsel for the appellee had no knowledge of the error and that he relied upon the stated conclusion of the trial judge that the Kohn case was the applicable law. Under these circumstances, appellee's counsel informed the judge:

"I have no objection to the charge being given.:"

"Both parties now know and agree that the instruction to the jury was erroneous The Kohn case was overruled by this court in Oechsle v. Hart (1967), 12 Ohio St. (2d) 306. Thus, the narrow question presented here is whether appellee, under the facts presented, induced the court to give the charge, and, therefore, lost her right to have the charge reviewed on appeal.

"Section 2321.03, Revised Code, provides:"

"An exception is not necessary, at any stage or step of the case or matter, to lay a foundation for review whenever a matter has been called to the attention of the court by objection, motion, or otherwise and the court has ruled thereon. Error can be predicated upon erroneous statements contained in the charge, not induced by the complaining party, without exception being taken to the charge."

In reversing the decision of the trial court, the Court (102) of Appeals found the charge to the jury to be erroneous and found further that the record does not reveal any inducement of the court by the appellee.

It is generally stated that errors which arise during the course of the trial of a cause, which are not brought to the attention of the court by objection or other wise, are waived and may not be raised on appeal. See, for example, Rosenberry v. Chumney (1960), 171 OhioSt. 48, 50, 12 O.O. (2d) 56, 57, 168 N.E. (2d) 285. One of the exceptions to this general rule concerns errors which occur in the charge to a jury. Where the trial court gives an instruction which is incomplete, but correct as far as it goes, such error in the charge is an error of omission and it is complaining counsel's duty to request the trial court to charge further in order to eliminate any possible confusion of the jury which may result from such deficiency. Unless counsel has requested the court to supply the omissions, the error is not reviewable on appeal. Rhoades v. Cleveland (1952), 157 OhioSt. 107, 47 O.O. 91, 105 N.E. (2d) 2; State v. Tudor (1950), 154 OhioSt. 249, 43 O.O. 130, 95 N.E. (2d) 385. However, where the trial court gives an erroneous statement of law in a charge, not induced by the complaining party, such an error is an error OF COmmission and it may be reviewed on appeal without the party's having objected to the charge. Section 2321.03, Revised Code; Rosenberry v. Chumney, supra; Simko v. Miller (1938), 133 Ohio St. 345, 10 O.O. 535, 13 N.E. (2d) 914; State v. Lynn (1966), 5 OhioSt. (2d) 106, 34 O.O. (2d) 226, 214 N.E. (2d) 226.

"It is appellant's contention that when the appellee stated to the trial court that she had no objection to the proposed charge, such action constituted an inducement under Section 2321.03, Revised Code, and that the error cannot be reviewed on appeal.

"The word induce is commonly understood to mean to lead on, prevail upon or to move a party by persuasion or influence. Oxford English Dictionary (1961Edition); Webster's Third New International Dictionary. The word induce connotes the use of persuasion or influence by a party on another to effect a result.

"(103) In the case at bar, nothing in the record indicates that the appellee's counsel in any manner persuaded or influenced the trial judge to give the erroneous charge to the jury. Under the instant circumstances, appellee's innocent acquiescence in the trial judge's erroneous conclusion that the applicable law was stated in the Kohn case does not establish that the charge was in any manner induced by the appellee.

"Appellant also argues that the Court of Appeals abused its discretion in hearing this assignment of error because the appellee failed to raise the propriety of the charge either in her motion for new trial or in the original and reply briefs filed in the Court of Appeals. While the record discloses that the assignment of error was first raised in oral argument before the Court of Appeals, the court deferred its decision until the appellant had an opportunity to file a supplemental memorandum in answer to the assigned error.

"Appellant's memorandum was filed on May 23, 1969, and appellee filed a reply on May 28, 1969. Appellant had ample opportunity to present his position to the Court of Appeals and under the facts of this case we do not feel that the court abused its discretion in considering the assignment of error.

For the reasons stated, the judgment of the Court of Appeals is affirmed and the cause is remanded to the Court of Common Pleas for further proceedings."
(underscoring ours)

The Trial Court did instruct the jury that the jury could only find for the plaintiff if the jury found wanton or wilful misconduct, and stated the jury must return a verdict for Defendant Thompson if only mere negligence was proved. The Court's instructions at Page 576 of the Transcript read:

"I must now define to you willful misconduct and wanton misconduct, but before I do that I must read you the Statute that applies to this case. This is Section 4515.02 of the Revised Code. It says:

"'The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death

of a guest, resulting from the operation of said motor vehicle, which such guest is being transported without payment therefore in or upon said motor vehicle, unless such injuries or death are caused by the willful or wanton misconduct of such operation.'"

Also at Page 580 of the Transcript the Court instructed:

"Now, the Court will instruct you that as a matter of law under the evidence produced, the plaintiff decedent Neno S. Nenoff, was a guest in the car and, therefore, this willful or wanton standard must apply."

At Page 2 of Respondent's Brief, his Counsel states:

"Thereafter, following arguments by both sides, the court instructed the jury generally on the issues of willful or wanton misconduct and assumption of risk, to which no objection was made by petitioner or any suggestion by petitioner or request that the Court charge on the issue of negligence instead of willful or wanton misconduct."

First of all, the Trial Court had instructed on the definition of negligence, beginning at page 573 as follows:

"Now, Counsel and the Court have used the word negligence. This is not a

> negligence action, but in order to define the rules that apply to this case, it's necessary that the Court define negligence for you.
>
> "In viewing negligence in the light of the alleged willful or wanton misconduct, the Court instructs you that willful or wanton misconduct is something more than negligence. To amount to willful or wanton misconduct the conduct of the driver must be more flagrant than negligence, must go beyond negligence.
>
> "Negligence is defined as the failure to exercise ordinary care, that degree of care which a reasonably prudent person would use or exercise under the same or similar circumstances. Negligence is synonymous with heedlessness, carelessness, thoughtlessness, inattention, inadvertence and oversight. Negligence implies a failure to comply with an indefinite rule of conduct under the circumstances of any particular case."

Again, once the Trial Court rules, or affirmatively instructs on a point, such instruction, if erroneous, is an "error of commission", and there is nothing a party must or can do. Here, the Trial Court was emphatic that Respondent was correct in his Motion that the Ohio Guest Statute controlled. Plaintiff's Counsel for over 6 pages of the Transcript, Pages 391-b to 396, had contended Plaintiff had proved a prima facie case that decedent was a passenger, and not under the Guest Statute, but the Court ruled in favor

of Respondent and against the Plaintiff. So there was nothing thereafter that needed to be done to preserve the point for appeal - the error was an "error of commission", just as in the Carrothers v. Hunter case supra where the wrong rule of law was instructed, but error could be asserted. In 1970 the Ohio Guest Statute was thought by all to be constitutional; later in 1974, Petitioner had hope, though dim, of attacking it, and this was done on appeal. The law and argument demonstrating that Petitioners did not waive their right to attack the constitutionality of the Guest Statute was made in Petitioners' Brief at Page 27 on the propriety of Primes v. Tyler being applied to all pending cases, and at Page 33 that there had been no waiver because there was no known relinquishment of a known right. Rosenblatt v. Baer, 383 U.S. 75; Curtis Publishing Co. v. Butts, 388 U.S. 130; and at Page 37 of Petitioner's Brief is discussed O'Connor v. Ohio, 385 U.S. 92, which specifically held the Federal rule of applying Constitutional determinations of rights to pending cases, despite any Ohio Supreme

Court rules to the contrary. In Rosenblatt and O'Connor the attack on the constitutionality was first brough after the cases were being appealed.

That Ohio law frowns on exceptions or objections after the Court affirmatively rules, was pointedly brought out in this Trial, when the defendant was called to secure from him testimony opposing what defendant's own witnesses had said, but the Trial Court refused, the Transcript reading as follows at Page 538-6:

> "Mr. Rust: Your Honor, I will call the defendant to the witness stand on rebuttal, please, Defendant George Thompson.
>
> Mr. Jeffery: Object to procedure. He already testified.
>
> The Court: Objection will be sustained for the reason the Plaintiff called the Defendant as on cross-examination as part of their case in chief, and he did not testify in his own case and defense case.
>
> It is improper testimony.
>
> Mr. Rust: Let the Record show an exception.
>
> The Court: Mr. Rust, you know the law of Ohio does not require taking exception. Let's not fill up the record with unnecessary statements.

Mr. Rust: I accept your ruling, and I am abiding by it. I want the record to show that my view of the law differs, from my study."

Counsel intended to communicate to the Court that Counsel believed that under the law Defendent Thompson, who had not testified as part of his defense, could be called under Cross-Examination for those limited points as a part of Plaintiff's rebuttal in opposing the new points first brought up by Defendant in his defense.

Relevant here also is Ohio Revised Code 2321.02, which reads as follows:

"2321.02 EXCEPTION DEFINED. (GC 11559)

An exception is an objection taken to a decision of the trial court upon a matter of law."

Respondent cited 3 O. Jur. 2d Appellate Review, Section 185, which actually is not relevant here because all of the errors which Petitioner now asserts were errors of "commission," from affirmative and specific rulings by the Trial Court- and therefore, no further objection, nor exception, was needed. Respondent can't complain because Respondent induced

the Court to commit the errors. Relevant is the following statement in 3 O. Jur. 2d, Appellate Review, Section 218, which at page 89 reads in part as follows:

> "Under the Ohio practice since 1936, exceptions to an erroneous statement in a charge not induced by the complaining party are specifically eliminated in all respects.[15] This code section has been implemented by the Ohio courts.[16] Furthermore, under the first sentence of RC 2321.03 (GC 11560);[17] exceptions are not necessary as a condition to the review of any error in the refusal of a trial court to give special instructions requested before argument.[18]"

Footnote 18 above refers to Patton v. First Nat. Bank, (1938, App.) 28 O. L. Abs. 273.

Before leaving the issue of error in the Instructions, Petitioner did, as to certain alleged errors of omission, object to the Trial Court, Transcript at page 594, and included in the Appendix herein at page 10. These objections were made because the Trial Court's definition of Wanton Misconduct was more strict than required by Ohio law, and in the Survivorship Action, C. P. no. 206839,

Wanton Misconduct was omitted as a ground for exemplary damages; and lastly, in the Wrongful Death Action, the Court did not give Petitioner the benefit of the Presumption that decedent had acted with ordinary care to protect and preserve his life.

Petitioners sought recovery for exemplary damages only in the Survivorship Action, C. P. 206839, and the Court so instructed at Transcript Page 583.

THE TWO ISSUE RULE DOES NOT APPLY.

SINCE THE TRIAL COURT INSTRUCTED THE JURY THAT THE GUEST STATUTE PREVENTED PLAINTIFFS' RECOVERY ON PROOF OF MERE NEGLIGENCE, AND THIS WAS ERRONEOUS BECAUSE THE GUEST STATUTE IS UNCONSTITUTIONAL, PLAINTIFFS WERE SUBJECTED TO ERROR ON THE PRIMARY ISSUE OF LIABILITY, AND THEREFORE, EVEN IF THE SECONDARY ISSUE OF ASSUMPTION OF RISK WAS ERROR FREE, THE VERDICT MUST BE REVERSED UNDER WELL ESTABLISHED OHIO LAW, THAT ERROR ON THE PRIMARY ISSUE INVALIDATES THE VERDICT.

Respondent has really added nothing new, nor contrary to Petitioners' controlling precedent beginning at Page 14 of Petitioner's Petition heretofore filed. Those cases and arguments are valid.

Respondent has not cited any law different from that cited by Petitioner, in cases actually involving the 2 issue Rule.

Here, there was error on the Primary issue, that there could be no recovery for negligence because of the Guest Statute, because it is and was unconstitutional. The two issue Rule does not apply.

AS TO THE AFFIRMATIVE DEFENSE OF ASSUMPTION OF RISK, UPON WHICH DEFENDANT HAS THE BURDEN OF PROOF, THE EVIDENCE MERELY ROSE TO THE LEVEL, IF THAT, OF A QUESTION OF FACT FOR THE JURY. THEREFORE, THE VERDICT WAS NOT CONTROLLED BY THAT ISSUE, A ASSUMPTION OF RISK IS A SECONDARY ISSUE.

Petitioner did request an instruction on that issue.

There was no evidence Plaintiffs' decedent was intoxicated. He had worked at his trade until near to 5:00 P.M. Some witnesses did say Respondent Thompson was clearly not under the influence when Plaintiffs' decedent and he started to drive. Respondent Thompson further denied any Traffic Violations or other wrongful driving up to the time of the accident. There was no evidence to charge Plaintiffs' decedent with knowledge or notice that Respondent would try to take the curve at an excessive speed. By the evidence, he had driven safely up to that point. On this issue, at most, a question of fact was presented for the jury. Wever v. Hicks, 11 Ohio St. 2d 230 (1967); Davis v. Hollowell, 326

Mich. 673, 15 A. L. R. 2d 1160.

THE SURVIVING SPOUSE AND MINOR CHILDREN OF THE DECEDENT IN A WRONGFUL DEATH ACTION HAVE A RIGHT AS "REAL PARTIES IN INTEREST" TO BE PRESENT DURING ALL THE TRIAL OF THEIR ACTION, AND DENIAL THEREOF IS CONTRARY TO THE FOURTEENTH AMENDMENT, AND PREJUDICIAL ERROR.

Respondent here has added nothing new which is relevant. Petitioners refer to their Petition, pages 17, and 44.

Mr. Jeffery, lead Trial Counsel for defendant Thompson, in his memorandum filed on June 26, 1970 in the Trial Court in responding in part to Plaintiffs' motion for a new trial, stated as follows:

> "(F) Mrs. Pauline Nenoff was not a party in this action and was excluded from the court pursuant to defendant's motion for seperation of witnesses. Although Mrs. Nenoff might be the widow of the decedent, she is not a party to the law suit. There was one plaintiff, Mrs. Pena Nenoff, the decedent's mother, and she sat in the courtroom during the entire proceeding."

Again, after the Court ruled, there was no need for objection or exception, under Ohio Revised Code 2321.03, above.

The surviving spouse as a Michigan resident was not eligible to be appointed as Executrix in Ohio. Petitioners were prejudiced by the Court's exclusion of the surviving spouse and children, because they knew much that could and would have been of help, and the jury's observation of their reactions throughout the trial was desired, and needed.

No one had more to lose than Mrs. Pauline Nenoff, but she wasn't allowed to participate through the trial, and truly was denied her "Day in Court".

Respondent in his Brief at page 11, states:

> "Neither Pauline Nenoff nor the children were competent to testify concerning the auto accident or circumstances leading to it, as they were in Flint, Michigan at the time, the accident occurring in Toledo."

That Mrs. Pauline Nenoff knew some details of her husband's condition and where Defendant and he were is shown by the transcript, at page 363-30, as follows:

"A On Tuesday. Neno was here; so me and my sister were doing some canning. Neno was supposed to call me at six o'clock, which he did.

"Q You received a telephone call from your husband at six o'clock?

"A I most certainly did, yes.

"Q Now then, Mrs. Nenoff, when you received that telephone call, do you know where it came from?

"MR. JEFFERY: Your Honor, I object to this. We have already gone through this in chambers. This witness cannot know where it came from. This is pure hearsay.

"THE COURT: I have to sustain that objection.

"The fact that the telephone call was made may remain.

"MR. JEFFERY: I would like to read into the record that in chambers we have already discussed this matter. It has been ruled that the contents of this whole conversation could not be admitted, but regardless, Mr. Bartlett has gone into it, and I object to this.

"MR. BARTLETT: I want to make a proffer of evidence. If Mrs. Nenoff were permitted to answer, she would respond that she did know where it came from; that her husband, Neno, stated that it came from the Yacht Club here in Toledo, and that she heard in the background music like a jukebox, glasses

and bottles and noise of glasses and bottles, and people laughing and talking."

Mrs. Pauline Nenoff would have been of help at the trial table, as she had talked with the defendant after the death, and naturally had acquired many details.

CONCLUSION

A man's life was taken because without any need or justification Respondent Thompson determined to take an obvious curve at an obviously wanton and highly dangerous speed, estimated by the Traffic Engineer Billings at a minimum of 62 mph, Transcript page 172, and as stated by Witness Mrs. Fredrick at Transcript page 141, as follows:

> "Well, we was going along on the bridge, we was going to the East Side and all of a sudden a car passed me and got in front of me and we was heading the same direction for the ramp. And he passed at a good rate of speed, and I made a statement that he was going to get it.
>
> Then before I knew it, then I seen the brake applied, dust flew, and everything happened real fast after that, and the man hit the pole."

No one else had ever attempted the curve at that speed.

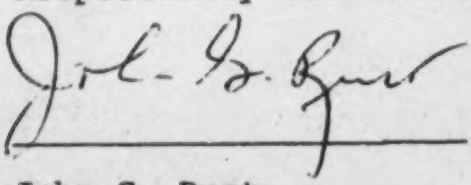
A jury could have understood the Trial Court's instructions as in effect requiring a finding of Respondent having to know an accident would happen.

Imposition of an unconstitutional standard has prejudiced a surviving spouse, their 6 children, and the mother. Also, the right of a surviving spouse and children as Real Parties in Interest to be present should be declared as constitutionally guaranteed, because the question will be coming up in the future.

All parties still litigating in pending cases should be given the benefit of a state's highest Court's decision invalidating a Guest Statute. Discrimination or partiality in application of Court decisions should be prevented by this Court so that our great Constitution will be carried out in practice, and our Court system more greatly respected.

These causes are worthy of this Court's Review, and we respectfully request the same.

Respectfully submitted,



John G. Rust,
Petitioner's Attorney

APPENDIX

COMMENTS OF TRIAL COURT IN RULING TO GIVE CERTAIN SPECIAL REQUESTS FOR INSTRUCTION, AND REJECTING OTHERS.

The Transcript on these points reads as follows at Page 559:

"The Court: I told the jury the matters the Court is considering will take more time than anticipated, and they are recessed until one o'clock with the usual admonition not to discuss the case.

Show the Plaintiff has submitted a number of instructions that the Court will grant, the ones now numbered one through eight, over the objections of the Defendant; and has rejected the ones that are submitted unmarked and submitted to the court reporter for the record, and containing either incorrect statements of law or comments upon the evidence.

"Mr. Jeffery: I have two right there."

"The Court: These are acceptable to the Court. Is there an objection? "

"Mr. Bartlett: Certainly."

"Mr. Rust: Yes, Your Honor."

"The Court: I will accept this" It will be No. 9."

SPECIAL INSTRUCTIONS GIVEN BY COURT TO JURY

BEFORE ARGUMENT

The above are found in the Transcript at Page 563-1, as follows:

"THE COURT: Ladies and gentlemen, for the record, this is what was done while were were recessed. The defendant and Plaintiff have both rested their cases, and the evidence is closed. Before the final arguments that Counsel are about to give to you now, each of the parties have the right to request from the Court written instructions of law to be read to you before the final argument so that you may understand the arguments better. These instructions are in writing, and each written instruction is a correct statement which relates to one subject, and may not be a complete statement of the law.

"What I give you now, the special instructions, and the oral instructions which I will give you after argument, togther constitute the law of the case. Now these special instructions will be with you in the jury room in writing. Because they are with you in writing, they carry no more weight than the general instructions of law which the Court will give you after arguments.

Special Instruction No. 1:

Ladies and Gentlemen of the Jury, you are instructed that

in arriving at a verdict you must no permit yourselves to be influenced in the slightest degree by sympathy, prejudice, or any emotion in favor of or against either party, or their attorneys or witnesses, but you must proceed solely upon the evidence introduced and the instructions of the Court. A lawsuit is not properly a popularity contest, and you are not being called upon to render a verdict based upon whom you like or dislike, approve or disapprove, but rather you are called upon here to make certain legal determinations, and to decide the case solely upon the evidence and facts, and the instructions of law thereon given by the Court.

Number 2, Ladies and Gentlemn of the Jury, the Court instructs you that the drinking of alcoholic beverages does not provide a defense to any person. The law holds any man who is under the influence of alcohol to any extent to knowing that which a sober person under all the circumstances would have known, and requires such a person drinking alcoholic beverages to hold to the same standard of care and performance as the law requires of a sober person under the same circumstances.

Number 2-A. Wanton misconduct is such behavior as manifests a disposition to perversity, and it must be under such surrounding circumstances and existing conditions that the part doing the act of failing to act must be conscious, from his knowledge of such circumstances and conditions, that his conduct will probably result in injury. Wanton misconduct implies a failure to use any care for the Plaintiff and an indifference to the con sequences, when the probability that

harm would result from such failure is great, and such probability is known, or ought to have been known, to the defendant.

No. 2-B Ladies and Gentlemen of the Jury, the Court charges you that wantonness can never be predicated upon speed alone, nor upon intoxication alone; but when the concomitant facts show an unusually dangerous situation and a consciousness on the part of the driver that his conduct will in common probability result in in jury to another ofwhose dangerous position he is aware, and he drives on without any care whatever, without slackening speed, at such time and place as would be effective to prevent an accident or collision, in utter heedlessness of the other person's jeopardy, speed plus such unusually dangerous surroundings and knowing disregard of another's safety, may amount to wantonness.

No. 3 Ladies and Gentlemen of the Jury, you are instructed, that if under all the instructions of law given by the Court, you find for the Plaintiff, your next duty would be to determine the amount of your verdict, and in the action for wrongful death, which is Action No. 203720, the measure of damages in that action is the pecuniary injury only, the money value of the deceased Neno S. Nenoff to his mother and wife and his children. This is the law. The Jury cannot consider the bereavement or mental suffering of his family, nor can you, in this action for wrongful death, Number 203720, allow anything by way of exemplary damages. The sole question for the Jury as to damages is what actual pecuniary loss the beneficiaries

of the deceased named in the Petition have sustained by his death; and in coming to a conclusion on this matter, the Jury may consider the habits of the deceased whether or not he was an industrious man, his physical condition, his capability of earning money, the manner in which he provided for his beneficiaries, his expectancy of life, and such other circumstances presented by the evidence as will aid you in coming to a correct conclusion.

In determining the amount of damages, if any, in a case like this, with reference to the earning power of the decease, the Jury is instructed that the true basis for recovery for the death of Neno S. Nenoff is what you may find that the decedent would probably have contributed to his family, either for theri support or as an addition to his estate. You may also consider whatever losses, if any, are proved by the evidence, that the beneficiaries would probably have suffered as a result of the loss of any instruction and training which the decedent would have given to them in work and business and other habits which directly affect one's ability to make or hold onto money; and whatever loss has occurred due directly to the denial of his business advice and counsel and judgment, and the loss of any financial assistance, which you find he probably would have given had he lived. The measure of damages for the loss of aaid decedent, so far as future earnings and contributions go to constitute damages is the present value of the contributions which you find that the decedent would probably made to the beneficiaries, ascertained by deducting the cost of his living and expenditures from his net income and no more can be allowed than the present worth of accumulations arisin g from such net income, based upon

the expectancy of life. That is, having ascertained the total sum, its payment must be anticipated, and no more than the present worth thereof can be awarded in damages. The discount should be made only from the time it is found that such contributions would have been actually made had the decedent lived, and not at the end of the decedent's expectancy.

No. 4, If the Jury finds for the Plaintiff, the Jury, in determining the amount of damages to be awarded to Plaintiff, may consider whether the pruchasing power of moeny and the cost of living will change, and also any changes which it finds in the amounts of money which the decedent would probably earn in the future had he lived.

No. 5, The Court instructs you that under the law the children of Neno S. Nenoff had a legal right to be supported by their father, and said decedent was under a legal duty to support them, regardless of any other support or money that might beavailable for the support of said children from any other source. The Court further instructs the Jury that likewise, the Decedent was under a duty to support his wife, and this duty would have contineued into the future unlessshe failed her duties as a wife, and that said duty of support would continue, regardless of whether she inherited money or not. Until the evidence proves the contrary, the law presumes that each man will obey the law. You may also consider the procedure available for enforcement of this duty of support which the law provides, and whether the decedent, had he lived, would have discharged his duties of support.

No. 6 The Court instructs the Jury that in determining the

amount of damages, the Jury is to disregard the possibility of the remarriage of Mrs. Pauline Nenoff.

No. 7 Ladies and Gentlemn of the Jury, you are instructed that to charge the Plaintiff's decedent had full knowledge of a condition, which condition would be obviously and patently dangerous to him, and you must furhter find that he voluntarily and knowingly exposed himself to the hazard created; and you are further instructd that entering an automobile, in and of itself alone, with knowledge that the driver had been drinking, would not in and of itself aloen, constitute assumption of risk by Plaintiff's decedent.

No. 8 Ladies and Gentlemen of the Jury, in Action No. 206839, if you find that the Defendant is guilty of wanton misconduct and that the Plaintiff is entitled to recofer, you will also consider whether or not the Plaintiff is entitled to exemplary damages. Exemplary damages are damages which are awarded against a party for his wrongful act or conduct, and which may serve as an example, to deter others from the commission of similar acts. Such damages are awarded by the Jury, if at all, on the groudns of public policy. The object of the law in permitting an award of exempllary damages, is to punish the wrongdoer in dollars and cents, and to this give a warning to the wrongdoer and others, to prevent the repetition of the wrong, or a similar wrong, to others. The amount of such exemplary damages is left to the sound judgment and discretion of the Jury. In the event you find the Plaintiff is entitled to exemplary damages, you may in your estimate of the amount to be awarded as compensatory damages in Acton No. 206839 take into condideration and include reasonable

attorney fees of counsel employed in the prosecution of the Action. Provided, however, that in no event may you award damages in excess of the amount prayed for in the Petition in Action No. 206839, that is the sum of $25,000.

No. 9. Wanton misconduct is such conduct as connotes perverseness exhibited by deliverate and uncalled for conduct, under such surrounding circumstandes and existing conditions that the party doing the act or failing to act must be conscious, from his knowledge of such surrounding circumstances and existing conditons, that his conduct will in all common probability result in injury. S peeding alone does not constitute willful or wanton misconduct. Driving while intoxicated is not of itself sufficient to constitute an act of wanton or willful misconduct. There must be a consciousness on the part of the driver that his conduct will in all probability result in injury to another.

Therefore, I instruct you that if you find that the defendant, George M. Thompson,was driving a motor vehicle at a speed that was faster than he could safely proceed around the curve on the ramp, but that there was no consciousness on the part of the defendant, George M. Thompson, that his conduct would in all probability result in injury to another, then your verdict must be for the defendant, George, --this has a W. I presume that a misprint. Make that George M. Thompson. I will finsih the sentence - then your verdict must be for the defendant, George M. Tho-mpson, on the question of liabiltiy.

Ladies and Gentlemen, counsel by agreement have asked for andbeen granted two hours of total argu-

ment for each side. We will now proceed with Plaintiff's opening argument.

Thereupon, counsel for the respective parties presented their closing argument to the Court and Jury."

PETITIONERS' REQUESTS TO THE TRIAL COURT TO CORRECT HIS "ERRORS OF OMISSION" ON THE DEFINITION OF WANTON MISCONDUCT BY EMPHASIZING ACTUAL CONSCIOUSNESS OF PROBABILITY OF INJURY, RIGHT TO EXEMPLARY DAMAGES FOR WANTON MISCONDUCT, AND FAILURE TO STATE DECEDENT ENTITLED TO PRESUMPTION OF DUE CARE.

The transcript shows the above at page 591, as follows:

> "Are there any further instructions that you want?
>
> "MR. RUST: Yes, Your Honor. (Thereupon, an off-the-record discussion was had.)"

And the transcript also states, at page 594:

> "MR. RUST: (Aside to Reporter) Let the record show that immediately after the Judge finished his remarks and instructions of law and called counsel to approach the bench, that I then asked the Judge to charge on the following points:
>
> "First of all on the issue of wanton misconduct that when he read his statement and definition in regards to the term of probability, he omitted to use the words, "or ought to have been known", and I asked him then to cover that by reading again Special Instruction 2 on wanton misconduct, which is taken from the Ohio Book of Court Approved Instructions.

"Number two, that I asked the Judge to instruct that if the jury found malice, as the Court defined it or if the jury found the defendant was guilty of wanton misconduct, then in either event that they may award examplary or punitive damages, if they chose to do so.

"Number three, I asked him to charge that the law presumes that Neno Nenoff acted with ordinary care to protect and preserve his life. (End of aside to reporter).

"At 4:40 p.m. the jury submitted a question asking, "If we find for the Plaintiff in one case, do we have to find for the Plaintiff in the other?"

"The question was simply answered, "Yes." "